(1)

88-427

No. ———

Supreme Court, U.S.
FILED
SEP 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARK B. HARMON, *et al.*,
Petitioners,

v.

RICHARD L. THORNBURGH, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHEN H. SACHS
Counsel of Record
CARL WILLNER
STEPHEN M. CUTLER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800
Attorneys for Petitioners

Of Counsel:
JOHN A. POWELL
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Fourth Amendment to the United States Constitution prohibits the Attorney General of the United States from requiring employees of the Department of Justice to submit to warrantless seizures and chemical searches of their urine for evidence of drug use, where such seizures and searches are to be conducted in a random manner without any reason to believe that the employees being tested have used illegal drugs or that drug use is a problem in the Department of Justice, and the employees to be tested are not in positions directly affecting public safety or involving contact with illegal drugs.

PARTIES TO THE PROCEEDING

The plaintiffs in the district court (all of whom are petitioners here) were: Mark B. Harmon, Cynthia Alford, Daniel L. Bell II, Tressa J. Borland, Jo Brooks, Daniel Butler, David D. Buvinger, Kevin Callahan, Patricia G. Chick, Rebecca P. Dick, Karla Dobinski, Norajean M. Flanagan, Michael J. Gennaco, Albert S. Glenn, Elaine M. Gordon, Irv Gornstein, Lorna Grenadier, Nelson D. Hermilla, Bradley D. Jackson, Lisa Kahn, Christopher J. Kelly, Diane R. Kilbourne, Barry Kowalski, Louise A. Lerner, Gregory F. Linsin, Peter W. McCloskey, Marie K. McElderry, Mary Jean Moltenbrey, Eric W. Nagle, Kathleen B. Nalty, Leo D. Neshkes, David Orbuch, Criselda Ortiz, John R. Sawyer, Charles R. Schwidde, Deborah Sines, Isabelle M. Thabault, Linda F. Thome, Fred R. Wagner, Beneva Weintraub, Paula A. Wolff and William R. Yeomans. The defendants below were then-Attorney General Edwin Meese III and Assistant Attorney General for Administration Harry H. Flickinger, who were named in their official capacities only. Attorney General Richard L. Thornburgh has been substituted as a respondent here. *See* Fed. R. Civ. P. 25(d); Sup. Ct. R. 40.3.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. The Administration's Random Urinalysis Program	3
B. The Proceedings in this Case	9
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	19

TABLE OF AUTHORITIES

Cases Page

Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency, 663 F. Supp. 1560 (C.D. Cal. 1987) 14

AFGE v. Dole, 670 F. Supp. 445 (D.D.C.), *appeal docketed*, No. 87-5417 (D.C. Cir. Dec. 11, 1987) .. 14, 15, 18

AFGE v. Meese, No. C-88-1419 SAW, —— F. Supp. —— (N.D. Cal. June 16, 1988) 14

AFGE v. Turnage, No. C-88-20357 WAI (N.D. Cal.) (motion for preliminary injunction filed June 23, 1988) 17

AFGE v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986) 9

American Federation of State, County & Municipal Employees, Local 3097 v. Meese, No. 88-1875 (D.D.C.) (complaint filed July 8, 1988) 17

Bolling v. Sharpe, 344 U.S. 873 (1952) 12

Brown v. Board of Education, 344 U.S. 1 (1952) .. 12

Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) 14

Eastern Equities Corp. v. United States, 282 U.S. 409 (1931) 12

Greene v. McElroy, 360 U.S. 474 (1959) 12

Hansen v. Turnage, No. C-88-20361 RPA, —— F. Supp. —— (N.D. Cal. July 28, 1988) 17

Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987), *petition for cert. pending*, No. 87-1706 (filed April 15, 1988) 14

Kinsella v. Krueger, 354 U.S. 1 (1957) 12

Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir. 1988) 14, 15

McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) 14

McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960) 12

Mullholland v. Department of the Army, 660 F. Supp. 1565 (E.D. Va. 1987) 14

TABLE OF AUTHORITIES—Continued

Page

NFFE v. Carlucci, 680 F. Supp. 416 (D.D.C.), *appeal docketed*, No. 88-5080 (D.C. Cir. Mar. 16, 1988), permanent injunction issued and stayed, —— F. Supp. —— (D.D.C. July 6, 1988) 14, 15, 18

National Treasury Employees Union v. von Raab, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988) 11, 12, 14, 15

New Jersey v. T.L.O., 469 U.S. 325 (1985) 10

O'Connor v. Ortega, 107 S.Ct. 1492 (1987) 10

Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d 57, 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987) 14

Penny v. Kennedy, 846 F.2d 1563 (6th Cir. 1988) .. 14

Policeman's Benevolent Association v. Township of Washington, 850 F.2d 133 (3rd Cir. 1988) 14

Porter v. Dicken, 328 U.S. 252 (1946) 12

Porter v. Lee, 328 U.S. 246 (1946) 12

Quadros v. Reagan, Case No. C-88-1764 RHS, —— F. Supp. —— (N.D. Cal. Aug. 12, 1988) .. 17

Railway Labor Executives' Association v. Burnley, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S.Ct. 2033 (1988) 12, 14, 15

Reid v. Covert, 354 U.S. 1 (1957) 12

Royal Insurance Co. v. United States Shipping Board Merchant Fleet Corp., 280 U.S. 320 (1930) 12

Rushton v. Nebraska Public Power District, 844 F.2d 562 (8th Cir. 1988) 14

Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir.), *cert. denied*, 107 S.Ct. 577 (1986) 14, 15

Taylor v. McElroy, 360 U.S. 709 (1959) 12

Taylor v. O'Grady, 669 F. Supp. 1422 (N.D. Ill. 1987) 14

Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985) 14

United States v. Mistretta, 108 S.Ct. 2894 (1988) 17

United States v. Nixon, 418 U.S. 683 (1974) 2

TABLE OF AUTHORITIES—Continued

	Page
Wilson v. Bohlender, 361 U.S. 281 (1960)	12
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 937 (1952)	17
Constitutional Provisions, Statutes, Regulations and Executive Materials	
U.S. Const. amend. iv	2
U.S. Const. amend. v	11
5 U.S.C. § 706(2)(A)	11
5 U.S.C. § 2302(b)(10)	11
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
28 U.S.C. § 1331	9
28 U.S.C. § 2101(e)	2
Executive Order 12,564, *reprinted in* 51 Fed. Reg. 32,889 (1986)	2, 3, 14
Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11,970 (1988)	3, 6
Fed. R. Civ. P. 25(d)	i
Sup. Ct. R. 18	13
Sup. Ct. R. 40.3	i
Books, Treatises and Periodicals	
Department of Justice Drug Testing Program: What You Need to Know	6
Isikoff, *Drug Testing Ferrets Out Few Users*, Washington Post, July 19, 1988 at A17	6
R. Stern, E. Gresman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986)	12
President's Commission on Organized Crime, Report to the President and Attorney General, *America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime* (March 1986)	3
Washington Post, May 4, 1988, at A1	3
Briefs and Memoranda	
Burnley v. Railway Labor Executives' Association, No. 87-1555, Petition for Certiorari	13, 16
Thornburgh v. Harmon, No. 88-5265, Consent Motion to Expedite Consideration of the Appeal (D.C. Cir. filed Aug. 15, 1988)	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ———

MARK B. HARMON, *et al.*,
Petitioners,

v.

RICHARD L. THORNBURGH, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mark B. Harmon and his fellow employees at the United States Department of Justice respectfully petition the Court to issue a writ of certiorari before judgment by the court of appeals to review the judgment of the United States District Court for the District of Columbia in this case.

OPINION BELOW

The opinion of the district court is not yet reported. It is reproduced in the Appendix to this petition at pages 1a-12a.

JURISDICTION

The final judgment of the district court granting a permanent injunction was entered on July 29, 1988. App. 15a. The defendants' notice of appeal was filed on

August 5, 1988, App. 19a, and the case was docketed in the court of appeals on August 11, 1988, as No. 88-5265. App. 21a.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e). 28 U.S.C. § 1254(1) authorizes this Court to issue a writ of certiorari to review any case that is "in" the court of appeals, either "before or after rendition of judgment or decree" by that court. A petition for such a writ may be filed "at any time before judgment," 28 U.S.C. § 2101(e), and may be filed by "any party" to the case, 28 U.S.C. § 1254(1), including the party that prevailed in the district court. *See, e.g., United States v. Nixon*, 418 U.S. 683, 686, 690 (1974). Because the appellate jurisdiction of the court of appeals has properly been invoked, *see* 28 U.S.C. § 1291 (authorizing appeals from final decisions of the district courts), and the appeal has been properly docketed, this Court has jurisdiction to issue a writ of certiorari before judgment in this case.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Executive Order No. 12,564, 51 Fed. Reg. 32,889 (1986), the "Department of Justice Drug-Free Workplace Plan," the "Department of Justice Drug Free Workplace Program for the Offices, Boards and Divisions" and excerpts from Appendix A thereto, and pertinent portions of the "Mandatory Guidelines for Federal

Workplace Drug Testing Programs," 53 Fed. Reg. 11,970 (1988), are reproduced in the Appendix to this petition at pages 24a to 89a and pages 102a to 108a.

STATEMENT OF THE CASE

A. The Administration's Random Urinalysis Program

In March 1986, the President's Commission on Organized Crime issued a report urging, *inter alia*, the use of "suitable drug testing programs" in all federal agencies as a means of "express[ing] the utter unacceptability of drug abuse" in society, and as a model for similar programs that the Commission hoped would be instituted by state and local governments and by private employers.[1] President Reagan responded on September 15, 1986, by issuing Executive Order No. 12,564, 51 Fed. Reg. 32,889 (1986), which authorizes the head of every federal agency to institute random or otherwise uniform urinalysis drug testing of employees in "sensitive positions." Any employee whose job involves law enforcement, the protection of life and property, public health or safety, access to classified material, or "a high degree of trust and confidence" is considered "sensitive" and may be designated for testing.[2] On May 3, 1988 the Administration informed Congress that 345,528 federal employees have been designated for random testing pursuant to the Executive Order and their respective agencies' plans.[3]

Scope of Testing. In the Department of Justice, the Attorney General and the Assistant Attorney General for Administration have issued a "Department of Justice Drug-Free Workplace Plan" (the "DOJ Plan") and a

---

[1] President's Commission on Organized Crime, Report to the President and Attorney General, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME 483 (March 1986).

[2] Executive Order 12,564, App. 26a, 31a-32a.

[3] Washington Post, May 4, 1988, at A1.

"Department of Justice Drug Free Workplace Program for Offices, Boards and Divisions" (the "OBD Plan"). The OBD Plan designates for random drug testing those employees in the Offices, Boards and Litigating Divisions who are authorized to have access to top secret information, who conduct or assist in grand jury proceedings, or "whose assigned position duties include the prosecution of criminal cases."[4] All employees in such positions must have their urine tested for evidence of drug use during their first year of employment, and, for the remainder of their careers, all such employees are continuously subject to random testing. On June 27, 1988 the Department notified employees in the Offices, Boards and Litigating Divisions in Washington, D.C., that random testing could begin as soon as 60 days thereafter,[5] and announced that approximately 1800 of the employees notified had been designated for testing.[6]

Under the DOJ Plan, the positions subject to mandatory and random testing include, *inter alia*:

• Attorneys, and executive and administrative staff assistants, in the Office of the Solicitor General, on the rationales that "it would be inconsistent with the mission of the office for its incumbents simultaneously to represent the United States before this nation's highest court while violating its criminal statutes," and that "[m]istakes caused through impaired judgment could prove extremely expensive to the . . . American taxpayer. For example, the loss of a liability lawsuit by the Government could establish dangerous precedent and cost the Government incalculable sums of money."[7]

---

[4] OBD Plan, App. 73a.

[5] General Notice, June 27, 1988, App. 90a.

[6] Department of Justice Release, June 27, 1988, App. 98a.

[7] OBD Plan, Appendix A, App. 89a.

• Attorneys and secretaries in the Legal Policy Section of the Antitrust Division, on the grounds that "[d]ecisions and performance influenced or impaired by illegal drug use could result in inconsistent or poorly conceived policy development and implementation, failure to identify problems and recommend improvements in the way the Division accomplishes its mission, and lack of initiative to make legislative or management changes to improve overall effectiveness," and that "[d]rug usage could result in mishandling of grand jury, sensitive and classified materials . . . ." [8]

• Attorneys, law clerks, paralegals, secretaries and clerks in the Criminal Section of the Civil Rights Division, on the grounds that:

> "[i]llegal drug use could result in the failure to appropriately handle allegations of criminal misconduct. For example, bizarre allegations of criminal misconduct against public officials and private individuals continue to occur, *e.g.*, involuntary servitude/peonage of migrant workers. If these allegations had been received by an individual using illegal drugs, judgment may have impaired decision [sic] to forward for investigation and, ultimately, prosecution of this incident allowing for not only continued violations, but, possibly, increasing the number of individuals held involuntarily. Drug use could also jeopardize the level of secrecy required in grand jury preparation and presentation." [9]

• Attorneys, paralegals, and typing secretaries and clerks in the Environmental Crimes Section of the Land and Natural Resources Division, on the grounds that "if attorneys fail to vigorously carry out close investigations and prosecutions or to exercise sound judgment, serious felonies may escape detection and prosecution," and that "drug use by incumbents could result in the disclosure of

---

[8] OBD Plan, Appendix A, App. 85a.

[9] OBD Plan, Appendix A, App. 86a.

the identities of confidential sources and informants who could be subject to physical harm." [10]

The government has admitted, however, that "the vast majority of Justice Department employees do not use drugs" and that "there is no reason to believe that drug use is widespread in the Department of Justice." [11] These admissions are corroborated by the experience of other federal agencies conducting drug testing of civilian employees, which have consistently had positive rates of substantially less than one percent.[12] Thus, the district court below observed, "[d]efendants concede that illegal drug use is not a problem in the Department of Justice." App. 6a.

Manner of Testing. The Department of Justice, like other agencies, will conduct its drug testing in accordance with the "Mandatory Guidelines for Federal Workplace Drug Testing Programs" issued by the Secretary of Health and Human Services on April 11, 1988, 53 Fed. Reg. 11,970 (1988), pertinent portions of which are reprinted in the Appendix. An employee will be notified on the same day and "preferably within two hours, of the scheduled testing," App. 56a, to report to a "collection site," where he or she must produce positive photo identification and surrender his or her outer garments, briefcases, purses, and similar items to a "collection site person." This government agent must accompany the employee into the restroom and remain there throughout the collection process. App. 103a-104a.

The employee must wash his or her hands before urinating, and must thereafter stay in the presence of the

---

[10] OBD Plan, Appendix A, App. 87a-88a.

[11] *Department of Justice Drug Testing Program: What You Need to Know* at 9.

[12] Isikoff, *Drug Testing Ferrets Out Few Users*, Washington Post, July 19, 1988 at A17.

collection site person, who will deny him or her any further access to water fountains, faucets, soap dispensers or cleaning agents. Although an employee may urinate in a stall, the collection site person must observe and record any "unusual behavior or appearance" by the employee. App. 104a. The employee must hand the urine specimen directly to the collection site person, and only thereafter may the employee wash his or her hands. App. 105a. The collection site person must immediately—and in view of the employee—visually inspect the urine for normal coloration and for any signs of contaminants, and must measure its temperature. If the sample appears abnormal, or it is unacceptably cool or warm, or if there is any other reason to believe that an employee has attempted or may attempt to alter or substitute a specimen, the employee is required to provide a second urine sample as soon as possible under the "direct observation" of a collection site person. App. 105a-106a. If the employee does not produce at least 60 milliliters of urine on the first try, he or she is required to repeat the entire process until that amount of urine is obtained, and "may be given a reasonable amount of liquid to drink for this purpose." App. 105a. The sample or samples are then sealed, labeled, and packaged for mailing to a laboratory. App. 106a-108a.

The DOJ and OBD Plans recognize that positive test results may be the result of legitimate activities such as the use of prescription medication. *See* App. 58a. Accordingly, they provide for review of the results by a medical officer, who may be a Department employee or a private contractor. App. 39a-40a, 48a-49a, 58a, 72a. In order to avoid disciplinary action based on an apparently positive test result, an employee may have to disclose highly confidential medical information to this government agent, since the burden is on the employee to "justify" a positive test result. App. 58a. Further, if the medical officer does not accept the employee's ex-

planation and reports the positive result to the employee's supervisors, the employee may be forced to disclose these private medical matters to them, to other officials involved in the disciplinary process, and ultimately to the courts in an attempt to avoid discipline and discharge.

The district court here recognized that "the highly controlled environment and the elaborate procedure designed for obtaining urine samples of an apparently law-abiding employee outside the context of a routine medical examination may be considered offensive and demeaning" and that "other strong privacy interests are implicated in drug testing." App. 8a-9a.

Disciplinary Consequences. An employee who refuses to provide a urine sample upon demand is subject to discipline, including dismissal. App. 56a, 58a.

A single "verified" positive test result [13] is cause to find that an employee uses illegal drugs, and the Department "shall not allow an employee to remain on duty in a sensitive position after being found to use illegal drugs." App. 59a. An employee may be referred to a rehabilitation program after a first positive test, but disciplinary action will nevertheless be instituted and the employee can even be dismissed. App. 59a-60a. The positive results of a drug test may be disclosed to any Department officials authorized to take disciplinary action against the employee. App. 62a. An employee who refuses to enter a rehabilitation program or who tests positive a second time must be dismissed. App. 60a. These disciplinary consequences follow without regard to the nature of the employee's job performance.

---

[13] Under the DOJ and OBD Plans, the Department would conduct drug testing using an initial immunoassay test, "verified" by a gas chromatography/mass spectrometry test. App. 41a. Considerable evidence was offered before the district court to show that these testing procedures can produce positive results that are due not to illegal drug use but to laboratory errors or use of legitimate substances. The district court did not address this issue.

B. The Proceedings in This Case

Plaintiffs filed this suit on June 28, 1988, the day after the Department of Justice notified its employees that in as soon as sixty days it would commence mandatory urinalysis drug testing for test-designated employees in "sensitive" positions. This testing would be on a random basis—that is, without any reason to suspect that any particular employee had used illegal drugs.

The plaintiffs, petitioners here, are Mark B. Harmon, a Trial Attorney in the Criminal Section of the Civil Rights Division, and forty-one other Justice Department lawyers, economists and paralegal employees who are subject to random urinalysis.[14] In their complaint, plaintiffs alleged that the Department of Justice's random drug testing program violated their rights under the Fourth Amendment and other constitutional and statutory provisions. Federal jurisdiction rested on 28 U.S.C. § 1331. Plaintiffs moved for a preliminary injunction, and the defendants filed a motion to dismiss, in part, and for summary judgment, in part. Both motions were heard by the district court (George H. Revercomb, J.) on July 28, 1988, and on July 29, that court granted plaintiffs' motion and issued a preliminary injunction.

The court agreed with the defendants' assertion "that drug abuse by federal employees is intolerable," App. 5a, but emphasized that, "[q]uite simply, the issue 'is not *whether* drug use, off-duty or on-duty is incompatible with federal employment. Rather, the question is *by what means* it is permissible to come by evidence of such drug use.'" *Id.*, quoting *AFGE v. Weinberger*, 651 F. Supp. 726, 735 (S.D. Ga. 1986) (emphasis in original). Turning to that issue, the court first held, as has every other

---

[14] Petitioners are employed in the Antitrust Division, the Civil Division, the Civil Rights Division, the Criminal Division, and the Land and Natural Resources Division. Thirty-eight are attorneys and four hold other positions. *See* Complaint at ¶¶ 4-8.

court that has considered the matter, that compulsory urinalysis is a search and seizure that must be measured against the standards of the Fourth Amendment. App. 5a.

The court then held these random searches unconstitutional under the standards this Court has articulated in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) and *O'Connor v. Ortega*, 107 S.Ct. 1492 (1987). The court found that random drug testing could not be justified at its inception because, given defendants' concession "that illegal drug use is not a problem in the Department of Justice," it is "highly unlikely that compulsory random urinalysis drug testing of otherwise trusted and apparently law-abiding employees would turn up evidence of work-related drug use." App. 6a. Nor, the court ruled, could the searches be justified purely on a deterrence rationale, since "something more than unfounded fears must justify an intrusive search," App. 7a, and "there is no nexus between [the government's alleged interests of] fitness for duty, security and integrity on the one hand, and compulsory random urinalysis drug testing on the other, where no drug problem is believed to exist." App. 8a. Moreover, the court reasoned, "it is impossible to argue that mandatory random urinalysis drug testing serves the purpose of deterring illegal drug use by trusted and apparently law-abiding employees. In other words, defendants cannot claim a compelling governmental interest in deterring something that poses no threat and therefore does not need to be deterred." App. 10a.

The court rejected fitness for duty as a justification for random drug testing because, as the government had conceded, "urinalysis does not measure an employee's current impairment." App. 9a. The court also rejected as insufficient the government's asserted security and integrity interests, observing that "[m]any other conceivable forms of misconduct by plaintiffs *could* be harmful to the compelling governmental interests defendants assert. For example, an employee might embezzle, ob-

struct justice, or accept bribes. Such acts would clearly harm the integrity and public image of the government, yet no one could seriously argue that, absent any grounds to suspect misconduct, defendants would be justified in tapping that employee's telephone, censoring his mail or searching his home." App. 11a.[15]

On the same day that the court issued its decision, defendants made an oral motion for a stay pending appeal, which the court denied from the bench. Immediately thereafter, on defendants' unopposed oral motion, the court issued a permanent injunction prohibiting defendants "from implementing mandatory random drug testing by urinalysis in the Offices, Boards, and Litigating Divisions of the Department of Justice under the 'Department of Justice Drug-Free Workplace Plan.'" App. 13a, 15a.

The Department of Justice filed its notice of appeal on August 5, 1988, and on August 15 moved for expedited consideration of the appeal. The court of appeals has now established an expedited schedule, requiring that briefing be completed by November 28, 1988, and has scheduled oral argument for December 15, 1988.

REASONS FOR GRANTING THE WRIT

A grant of certiorari before judgment is unusual. This case, however, is also unusual, in that it would afford a far more apt vehicle to resolve the constitutionality of the numerous random drug testing programs that have been proposed or initiated throughout the United States than would the two drug testing cases that this Court has already agreed to hear. *See National Treasury Employees Union v. von Raab*, No. 86-1879, *cert. granted*, 108 S.Ct.

---

[15] The district court did not reach plaintiffs' alternative claims for relief under the Fifth Amendment, the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and Section 101(a) of the Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(10). Plaintiffs do not seek review of those claims in this Court.

1072 (Feb. 29, 1988); *Burnley v. Railway Labor Executive Association*, No. 87-1555, *cert. granted*, 108 S.Ct. 2033 (June 6, 1988). This Court has exercised the power to grant certiorari before judgment "not only in cases of great public emergency but also in situations where similar or identical issues of importance are already pending before the Court and where it is considered desirable to review simultaneously the questions posed in the case still pending in the court of appeals." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* at 43 (6th ed. 1986).[16]

---

[16] It has been perhaps the most frequent function of the writ of certiorari before judgment to bring before the Court cases which present legal issues related to pending cases and that should be decided together with them. In *Porter v. Dicken*, 328 U.S. 252, 254 (1946), the Court explained that it was "prompted" to grant certiorari before judgment "by reason of the close relationship of the important question raised to the question presented in *Porter v. Lee*," 328 U.S. 246 (1946), which was already pending before the Court. The Court granted certiorari before judgment in *Taylor v. McElroy*, 360 U.S. 709 (1959), "because of the pendency here of *Greene v. McElroy*," 360 U.S. 474 (1959), which raised similar questions. *Taylor*, 360 U.S. at 710. And the Court granted certiorari before judgment in *Bolling v. Sharpe*, 344 U.S. 873 (1952), in order to consider that case together with *Brown v. Board of Education*, because "the effect of any decision which it [might] render in [*Brown* is] such that it would be well to consider, simultaneously, the constitutional issues posed in [*Bolling*]." *Brown v. Board of Education*, 344 U.S. 1, 3 (1952). *See also Wilson v. Bohlender*, 361 U.S. 281, 283 (1960) (certiorari before judgment granted while *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960), which raised similar legal questions, was pending on appeal); *Kinsella v. Krueger*, 354 U.S. 1, 5 (1957) (certiorari before judgment granted while *Reid v. Covert*, 354 U.S. 1 (1957), which raised similar legal questions, was pending on appeal); *Eastern Equities Corp. v. United States*, 282 U.S. 409, 415 n.2 (1931) (certiorari before judgment granted so that case could be heard together with other cases raising same question); *Royal Insurance Co. v. United States Shipping Board Merchant Fleet Corp.*, 280 U.S. 320, 324-25 (1930) (same); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 288 and n. 77 (6th ed. 1986).

This Court's Rule 18, which provides for issuance of a writ of certiorari before judgment "upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court," focuses in effect on three criteria: the public importance of the issue presented, the need for a ruling from this Court, and the immediacy of that need. This case satisfies each criterion, and fully justifies the unusual treatment of certiorari before judgment.

The Solicitor General already has characterized the legal issues surrounding urinalysis drug testing as "an area of the utmost public importance." *Burnley v. Railway Labor Executives' Association*, No. 87-1555, Petition for Certiorari at 17 (*cert. granted* June 6, 1988). And in moving the court of appeals to expedite the appeal of this case, the government averred that "[t]he public has a strong and unusual interest in the prompt disposition of this appeal." [17]

Petitioners agree, and would add only that the issues are not limited to the Department of Justice but extend throughout the federal government and to all levels of state and local government. The widespread, suspicionless searches and seizures of federal employees mandated by Executive Order 12,564 represent an unprecedented frontal assault on the personal privacy and bodily integrity that Americans have heretofore taken for granted as protected against government intrusion by the Fourth Amendment.

In addition to its constitutional significance, the question presented by this case is one of direct and immediate concern to nearly three hundred and fifty thousand federal government employees, and of indirect, but in many cases no less immediate, concern to many thousands of

---

[17] Consent Motion to Expedite Consideration of the Appeal at 2, *Thornburgh v. Harmon*, No. 88-5265 (D.C. Cir. filed Aug. 15, 1988).

state and local government employees around the Nation. Executive Order 12,564 requires *every* federal agency to institute a program of suspicionless drug testing, and it proclaims its intention to "show the way" to all other public and private employers. App. 24a. Numerous state and local government agencies ranging from police departments to school boards have followed the administration's lead by instituting similar programs.[18]

As a result, the lower courts have been filled with cases challenging the legality of such drug testing plans. Six circuit courts of appeals have passed on their constitutionality in one form or another,[19] as have a multitude of district courts and state courts.[20] These decisions cannot

---

[18] *See, e.g.*, cases cited in notes 19 and 20 *infra*.

[19] *See Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir.), *cert. denied*, 107 S.Ct. 577 (1986); *Policeman's Benevolent Association v. Township of Washington*, 850 F.2d 133 (3rd Cir. 1988); *National Treasury Employees Union v. von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988); *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988); *Penny v. Kennedy*, 846 F.2d 1563 (6th Cir. 1988); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Rushton v. Nebraska Public Power District*, 844 F.2d 562 (8th Cir. 1988); *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S.Ct. 2033 (1988); *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), *pet. for cert. pending*, No. 87-1706 (filed April 15, 1988).

[20] *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560 (C.D. Cal. 1987); *AFGE v. Dole*, 670 F. Supp. 445 (D.D.C.), *appeal docketed*, No. 87-5417 (D.C. Cir. Dec. 11, 1987); *AFGE v. Meese*, No. C-88-1419 SAW, —— F. Supp. —— (N.D. Cal. June 16, 1988); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D. N.J. 1986); *Mullholland v. Department of the Army*, 660 F. Supp. 1565 (E.D. Va. 1987); *NFFE v. Carlucci*, 680 F. Supp. 416 (D.D.C.), *appeal docketed*, No. 88-5080 (D.C. Cir. Mar. 16, 1983), permanent injunction issued and stayed, —— F. Supp. —— (D.D.C. July 6, 1988); *Taylor v. O'Grady*, 669 F. Supp. 1422 (N.D. Ill. 1987); *Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57, 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987); *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985).

be reconciled with each other.[21] This Court has already recognized both the importance of the legal issues surrounding mandatory urinalysis programs, and the need for uniform nationwide guidance in resolving those issues, by granting writs of certiorari in *National Treasury Employees Union v. von Raab*, No. 86-1879 (cert. granted Feb. 29, 1988), and *Burnley v. Railway Labor Executives' Association*, No. 87-1555 (cert. granted June 6, 1988).

Unfortunately, neither of those cases affords an adequate opportunity to address the most serious issues presented by random drug testing in a manner that will effectively guide the lower courts. *Von Raab*, *Burnley* and this case all involve related issues of mandatory drug testing of public employees without particularized suspicion of drug use. Both pending cases, however, involve far more limited testing programs. *Burnley* involves post-accident testing of train crews, while *von Raab* involves testing which, while conducted without any evidence of a drug problem in the Customs Service, is only applied to employees seeking transfers to other positions, and not randomly to incumbent employees. Moreover, neither *Burnley* nor *von Raab* present a program of testing employees none of whom are directly responsible for public safety or directly involved in the interdiction of illegal drugs. As a result, the key constitutional questions posed by Executive Order 12,564, which are squarely presented by this case, may not even be reached in the

---

[21] For example, Judge Hogan, in holding the Department of the Army's civilian employee drug testing program unconstitutional in *NFFE v. Carlucci*, 680 F. Supp. 416 (D.D.C. 1988), recognized that his decision was in conflict with Judge Gesell's prior opinion upholding the Department of Transportation drug testing program, *AFGE v. Dole*, 670 F. Supp. 445 (D.D.C. 1987). *NFFE v. Carlucci*, 680 F. Supp. at 418. Both decisions are currently on appeal to the D.C. Circuit. Similarly, in *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, the Sixth Circuit has squarely rejected the Third Circuit's application of the administrative search doctrine to random drug testing programs in *Shoemaker v. Handel*, 795 F.2d 1136.

Court's consideration of either of the pending cases.[22] Thus, the Court's disposition of *Burnley* and *von Raab* may not settle the issues upon which the lawfulness of most government employee drug testing around the country will turn, and upon which the constitutional rights of hundreds of thousands of government employees depend. In contrast, the Court's resolution of this case would also resolve, beyond any doubt, the constitutionality of most of the drug testing proposed to be carried out under Executive Order 12,564.

In asking the Court to grant certiorari in *Burnley* after it had already agreed to hear *von Raab*, the Solicitor General noted that *Burnley* "offer[ed] a very different perspective on drug and alcohol testing" from *von Raab*," and would enable the Court "to consider a wider range of issues than [would] be presented if it consider[ed] *von Raab* alone." *Burnley v. Railway Labor Executives' Association*, No. 87-1555, Petition for Certiorari at 17, 19 (cert. granted June 6, 1988). The Solicitor General's observation is even more true of this case, which will present the Court with factual circumstances in which the individuals tested do nothing to set themselves apart from their fellow employees, either by involvement in an accident or by seeking another job in the Customs Service, and in which the government's rationale for testing is entirely unrelated to tangible and demonstrable concerns about the protection of public safety or the prevention of drug smuggling.

This case deserves immediate consideration because of the imminent implementation of government-wide random testing under Executive Order 12,564. Until May 1988, when the Administration certified its program to Congress, drug testing had only been permitted in a few federal departments and agencies. Now, however, drug

---

[22] Most federal agencies can be expected to defend drug testing not as a response to any specific drug problem, but as a generalized deferrence measure.

testing in the federal government and judicial challenges to it will proliferate. Sixty-day advance notices of testing began to issue in June and are currently being distributed, agency by agency. These notices have spawned several lawsuits in recent weeks,[23] and many more such lawsuits can be anticipated as additional agencies move toward implementation. It would be anomalous to have this random testing program go forward in some agencies, perhaps for years, until its constitutionality is finally determined in this Court, while it is enjoined elsewhere. Hundreds of thousands of federal employees—who face dismissal from employment if they assert their constitutional rights and refuse to urinate under surveillance and submit their urine to the government's fishing expedition for evidence of drug use—deserve prompt and authoritative guidance as to their rights.[24]

Granting review at this time will not deprive the Court of "the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937, 938 (1952) (Burton, J., dissenting from grant of certiorari before judgment). As noted above, there are already numerous appellate and trial court decisions concerning random testing, and there are likely to be more

---

[23] In addition to this case, *see, e.g., American Federation of State, County & Municipal Employees, Local 3097 v. Meese*, No. 88-1875 (D.D.C.) (Department of Justice; complaint filed July 8, 1988); *AFGE v. Turnage*, No. C-88-20357 WAI (N.D. Cal.) (Veterans Administration; motion for preliminary injunction filed June 23, 1988); *Hansen v. Turnage*, No. C-88-20361 RPA, —— F. Supp. ——, (N.D. Cal. July 28, 1988) (Veterans Administration; preliminary injunction granted); *Quadros v. Reagan*, Case No. C-88-1764 RHS, —— F. Supp. —— (N.D. Cal. Aug. 12, 1988) (Weather Service; preliminary injunction granted).

[24] *Cf. United States v. Mistretta*, No. 87-1904, *cert. granted*, 108 S.Ct. 2894 (1988) (granting certiorari before judgment to resolve constitutionality of federal criminal sentencing guidelines where many lower court cases were pending and lower courts were divided).

in the next few months.[25] Thus, the Court will have the benefit of the views of other courts while it is considering this case. In any event, the Court will already be considering closely related issues in *Burnley* and *von Raab*; thus, the addition of this case to the docket cannot detract from the quality of the Court's deliberations on the subject of compulsory drug testing but can broaden and potentially improve it. Because the Court's decisions in *Burnley* and *von Raab* may very well not resolve the constitutionality *vel non* of random testing for the broad range of employees covered by Executive Order 12,564, because that question will ultimately have to be resolved in this Court, because the many lower courts that will first have to address the constitutionality of drug testing under Executive Order 12,564 would find this court's resolution of a case squarely involving that order invaluable, and because hundreds of thousands of federal employees should not be left at risk of losing either their livelihood or their constitutional rights while awaiting resolution of that issue, the Court should agree to hear this case now.

* * * *

This case can practicably be considered together with the *von Raab* and *Burnley* cases. Petitioners are aware that those cases have been scheduled for argument on November 2, 1988. In the event that this petition is granted, petitioners are prepared to file their briefs in accordance with whatever schedule suits the Court's convenience.

---

[25] For example, two other cases addressing the constitutionality of federal employee random drug testing programs are now scheduled for argument in the District of Columbia Circuit on October 18, 1988. *NFFE v. Carlucci*, No. 88-5080 (testing of civilian employees in the Department of Defense) and *AFGE v. Dole*, No. 87-5417 (testing of employees in the Department of Transportation).

CONCLUSION

For the reasons presented above, the petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

STEPHEN H. SACHS
Counsel of Record
CARL WILLNER
STEPHEN M. CUTLER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800
Attorneys for Petitioners

Of Counsel:
JOHN A. POWELL
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

September 8, 1988

(2)

88-427

No. ———

Supreme Court, U.S.
FILED
SEP 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARK B. HARMON, *et al.*,
Petitioners,

v.

RICHARD L. THORNBURGH, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHEN H. SACHS
Counsel of Record
CARL WILLNER
STEPHEN M. CUTLER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800
Attorneys for Petitioners

Of Counsel:
JOHN A. POWELL
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

APPENDIX

TABLE OF CONTENTS

	Page
Harmon v. Meese, C.A. No. 88-1766, Memorandum Opinion and Order (D.D.C. July 29, 1988)	1a
Harmon v. Meese, C.A. No. 88-1766, Order (D.D.C. July 29, 1988) (granting preliminary injunction)	13a
Harmon v. Meese, C.A. No. 88-1766, Order (D.D.C. July 29, 1988) (granting permanent injunction)	15a
Harmon v. Meese, C.A. No. 88-1766, Order (D.D.C. July 29, 1988) (denying stay of preliminary injunction)	17a
Harmon v. Meese, Civil Action No. 88-1766(GHR), Defendants' Notice of Appeal (filed Aug. 5, 1988)	19a
Harmon v. Meese, No. 88-5265, Order (D.C. Cir. Aug. 11, 1988) (docketing appeal)	21a
Executive Order 12564 (Sept. 15, 1986), 51 Fed. Reg. 32,889 (1986)	24a
Department of Justice Drug-Free Workplace Plan (Sept. 25, 1987, as amended Dec. 17, 1987)	33a
Department of Justice Drug-Free Workplace Program for the Offices, Boards and Divisions, OBD 1792.1, Order (June 27, 1988)	67a
Excerpts from Appendix A to the Department of Justice Drug-Free Workplace Program for the Offices, Boards and Divisions	85a
General Notice of Drug Testing and Department of Justice Release (June 27, 1988)	90a
Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11,970 (Apr. 11, 1988), 2.2 Specimen Collection Procedures	102a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 88-1766

MARK B. HARMON, *et al.*,
Plaintiffs,

v.

EDWIN MEESE III, *et al.*,
Defendants.

[Filed July 29, 1988]

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss and for summary judgment.

Plaintiffs are forty-two employees of the Department of Justice who seek to enjoin implementation of the Department's "Drug Free Workplace Plan" in the Offices, Boards and Litigating Divisions of the Department. Under the plan, plaintiffs would be selected at random and ordered to produce urine specimens in order to permit the Department to ascertain whether they illegally use drugs. Plaintiffs contend that subjecting them to compulsory urinalyses without any suspicion of illegal drug use would violate their fourth amendment right to be free from unreasonable searches and seizures. Defendants, the Attorney General of the United States and the Assistant Attorney General for Administration, contend that the urinalyses to be conducted under the plan would constitute reasonable searches and therefore would not violate the fourth amendment.

The Department's drug testing program was created pursuant to Executive Order 12564, issued by President Reagan on September 15, 1986, which directed the head of each executive agency to develop plans to test all employees in "sensitive positions" for drug abuse in order to combat the "serious adverse effects [of drug use] upon a significant proportion of the national work force [which] results in billions of dollars of lost productivity each year." 51 Fed. Reg. 32,889. In accordance with this presidential directive, Attorney General Meese unveiled the "Department of Justice Drug-Free Workplace Plan" on September 25, 1987 (amended December 17, 1987) (the "DOJ Plan"), authorizing testing of, among others, all employees with less than one year's service ("probationary employees") holding sensitive positions and all employees in sensitive positions designated for drug testing ("testing designated positions or TDPs"). On December 15, 1987, defendants issued the Drug Free Workplace Plan (the "OBD Plan") of the Offices, Boards and Litigating Divisions of the Department of Justice. On June 27, 1988, defendants issued OBD Order 1792.1, giving notice of the implementation of the OBD Plan. All procedural hurdles have thus been cleared, and drug testing may commence in accordance with the OBD Plan as soon as August 26, 1988.

The OBD Plan calls for random testing of seven percent of all employees in testing designated positions, and mandatory testing of all probationary employees holding testing designated positions and all individuals tentatively selected for employment. The testing would seek evidence of use of marijuana, cocaine, opiates, amphetamines and phencyclidine. Employees would be selected for testing by neutral selection criteria, such as social security numbers. Disciplinary action would be initiated against any employee who tested positive or refused to be tested. Such disciplinary action could take various forms, including dismissal, suspension, removal from duty from a sensitive position, or reprimand. The employee would also be

referred to a rehabilitation program. After an employee has once been found to use illegal drugs, dismissal would be mandatory if that employee refused to obtain rehabilitation or tested positive for drug use a second time.

Testing designated positions are determined according to criteria enumerated in the DOJ Plan. The factors include the extent to which a DOJ component "[c]onsiders its mission inconsistent with illegal drug use" or "[m]ust foster public trust by preserving employee reputation for integrity, honesty and responsibility." DOJ Plan at 17. Also considered significant are whether in a particular position an employee carries firearms, deals with "sensitive" information, engages in law enforcement or in "activities affecting public health or safety"; is involved in the prosecution of criminal cases; or has access to grand jury proceedings. *Id.* at 17-18. The OBD Plan has designated for mandatory random testing all applicants tentatively selected for employment, all employees with top secret security clearances, all attorneys and support staff involved in conducting grand jury proceedings, all presidential appointees, all employees who prosecute criminal cases, and all employees whose duties include maintaining, storing or safeguarding controlled substances.

Appendix A to the OBD Plan lists testing designated positions within various OBD offices and the reasons why those positions within the particular office merit drug testing. Positions deemed "sensitive" and designated for testing include, for example, the chief, economists, financial analysts, mathematical statisticians, financial assistants, social science analysts, and secretaries within the Antitrust Division's Economic Litigation Section. A description of the incumbents' duties indicates that they "analyze and advise on all economic issues that arise in Division cases and investigations, merger reviews, regulatory agency proceedings, and legislative matters." The positions are designated for drug testing because:

> Impaired judgment and performance due to illegal drug use could result in a failure to consider adequately the economic implications of Division positions and actions, which could lead to higher prices, lower quality of goods and services, and lessened competitiveness of American businesses in world markets. Drug usage could also result in mishandling of Top Secret, grand jury, and other sensitive information, jeopardizing existing investigations and compromising both the integrity of the criminal enforcement process and national security.

OBD Plan, appendix A. Similar rationales are expressed for designating positions for drug testing within other sections of the Antitrust Division.

Similarly, trial attorneys in the Appellate Section of the Civil Rights Division are designated for drug testing because:

> Illegal drug use by incumbents could constitute a serious breach of public trust and could compromise decisions regarding litigation and legislation, resulting in a negative effect on the overall success of the program.

Id.

Employees selected for providing urine samples would be required to follow procedures that would be "as nonintrusive as possible." Memorandum of Law in Support of Defendants' Motion to Dismiss at 23. The employee who had been selected for random testing would report to a collection site. After showing photo identification, removing outer garments and washing hands, the employee would be directed to a rest room stall and required to produce a urine specimen of at least 60 milliliters. The employee would not be watched unless the collection monitor had reason to believe the employee might alter or substitute the specimen. After the sample had been taken, the collection monitor, in the presence of the em-

ployee, would transfer the sample to a bottle and measure its temperature to ascertain that the sample had not been altered or substituted. An identification label with the employee's fingerprint and identification number would be placed around the bottle. The employee would then sign a log book which in turn would be initialed by the collection monitor. Strict chain of custody procedures would be in place to ensure accuracy of the test results. The sample would be transported to a laboratory meeting strict quality control guidelines. Samples that initially tested positive under a Radio-Immuno-Assay test would be retested by the more exacting gas chromatography/ mass spectrometry technique, which is the most reliable indicator of the presence of drug metabolites in urine. The government concedes, however, that neither technique can measure current impairment, but rather can detect only whether the subject has used drugs relatively recently.

The Court agrees that drug abuse by federal employees is intolerable and that defendants' efforts to eradicate drugs from the federal workplace are well intentioned. It is the means defendants propose to achieve this laudable end that give the Court grounds for pause. Quite simply, the issue "is not *whether* drug use, off-duty or on-duty is incompatible with federal employment. Rather, the question is *by what means* it is permissible to come by evidence of such drug use." *American Federation of Government Employees v. Weinberger*, 651 F. Supp. 726, 735 (S.D. Ga. 1986) (emphasis in original).

Compulsory urinalysis of a public employee is a "search and seizure" because it infringes on a legitimate expectation of privacy. *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C. Cir. 1987); *National Federation of Federal Employees ("NFFE") v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *NFFE v. Carlucci*, 680 F. Supp. 416, 430 (D.D.C. 1988), *stayed pending appeal*, No. 88-5080 (D.C. Cir. Mar. 30, 1988); *American Federation of Gov't*

Employees v. Dole, 670 F. Supp. 445, 447 (D.D.C. 1987), *appeal docketed*, No. 87-5417 (D.C. Cir. Dec. 11, 1987). By its terms, the fourth amendment requires that governmental searches and seizures be reasonable. The reasonableness of a search depends upon the context in which it takes place. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). For example, to be reasonable, a public employer's search of his employee's desk and files need not be based upon a search warrant and probable cause, but requires "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct." *O'Connor v. Ortega*, 107 S.Ct. 1492, 1503 (1987). Determining whether a search is reasonable requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *NFFE v. Weinberger*, 818 F.2d at 942, *quoting O'Connor v. Ortega*, *supra*, 107 S.Ct. at 1499; *T.L.O.*, *supra*, 469 U.S. at 341. A search is reasonable if it "was justified at its inception" and if "the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 469 U.S. at 341.

In the context of public employer drug testing, a search is justified at its inception when " 'reasonable grounds [exist] for suspecting that the search will turn up evidence' of work-related drug use." *NFFE v. Weinberger*, *supra*, 818 F.2d at 943, *quoting T.L.O.*, 469 U.S. at 341. Defendants concede that illegal drug use is not a problem in the Department of Justice. Therefore, it is highly unlikely that compulsory random urinalysis drug testing of otherwise trusted and apparently law-abiding employees would turn up evidence of work-related drug use. Under the first prong of the test articulated by the Supreme Court and this Circuit, this Court concludes that the searches proposed in this case would not be justified at their inception.

Defendants, however, argue strenuously that compelling governmental interests justify the compulsory random urinalysis drug testing contemplated under their program. They contend that documentation of a "widespread" drug abuse problem among Department employees is not an absolute prerequisite to taking action to correct or stave off potential "disruption of the office and destruction of working relationships." Defendants' Memorandum at 56 (citing *Connick v. Myers*, 461 U.S. 138, 151-52 (1983) (upholding public employer's restrictions on assistant district attorney's right to comment on matters of primarily private concern which supervisor reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships in the office)). Defendants argue that the Department has "critical" interests in its employees' fitness for duty, in the security of sensitive and classified information, and in the integrity and public image of the Department. According to defendants, these compelling governmental interests justify the intrusion of compulsory random urinalysis drug testing upon plaintiffs' concededly legitimate expectation of privacy, especially given the fact that the drug problem in society at large has assumed "crisis" proportions.

Certainly, defendants have an interest in any illegal drug use by plaintiffs. However, something more than unfounded fears must justify an intrusive search. Even though a relaxed "reasonableness" standard applies to a search by the government as an employer, such a search must be for a noninvestigatory and work-related purpose. *O'Connor v. Ortega*, *supra*, 107 S.Ct. at 1503. Moreover, individualized suspicion is "usually a prerequisite to a constitutional search or seizure. . . . Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal." *T.L.O.*, *supra*, 469 U.S. at 342 n.8. Because "strong privacy interests are involved,"

Jones v. McKenzie, supra, 833 F.2d at 339, defendants must demonstrate a "compelling need of the government as employer [to] dispens[e] with the requirement." *NFFE v. Carlucci, supra,* 680 F. Supp. at 431. Even according considerable weight to the governmental interests identified as compelling does not help defendants, because there is no nexus between fitness for duty, security and integrity on the one hand, and compulsory random urinalysis drug testing on the other, where no drug problem is believed to exist.

An example of the required nexus is provided by *Jones v. McKenzie, supra,* in which the Court upheld compulsory drug testing as part of routine medical examinations of public employees involved in the transportation of young schoolchildren where such employees had repeatedly been involved in "incidents of bizarre or dangerous drug-related behavior, . . . syringes and bloody needles were found in restrooms used by Transportation Branch employees," and according to one estimate "60% of the employees assigned to the Transportation Branch [used] narcotics to some extent." 833 F.2d at 336. *Compare id. with Lovvorn v. City of Chattanooga,* 846 F.2d 1539, 1547 (6th Cir. 1988) ("[b]ecause there was not any evidence of a widespread or significant drug problem within the City of Chattanooga's Fire Department, the potential gains to society of initiating mandatory drug testing are significantly lower than would have been the case if there had been evidence of a systemic drug problem;" reasonableness of mandatory drug test of firefighters requires evidence either of significant department-wide drug problem or individualized suspicion).

This Circuit has held that compulsory urinalysis constitutes a significant infringement of plaintiffs' legitimate expectation of privacy. *Jones v. McKenzie, supra,* 833 F.2d at 339-340. For one thing, the highly controlled environment and the elaborate procedure designed for obtaining urine samples of an apparently law-abiding

employee outside the context of a routine medical examination may be considered offensive and demeaning. *See Railway Labor Executives' Ass'n* ("RLEA") *v. Burnley*, 839 F.2d 575, 586 (9th Cir. 1988) (urinalysis resembles intrusion posed by body cavity searches because offensive to human dignity and degrading), *cert. granted*, 56 U.S.L.W. 3831 (U.S. June 6, 1988); *AFGE v. Meese*, No. C-88-1419, slip op. at 10-11 (N.D. Cal. Jun. 16, 1988) ("[b]eing tapped during the work day and ordered to urinate into a container while under the close surveillance of a government representative, 'regardless of how professionally or courteously conducted, is likely to be a very embarrassing and humiliating experience' ") (*quoting Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514 (D.N.J. 1986)). Moreover, other strong privacy interests are implicated in drug testing. "Because drug tests often furnish information about employee activities occurring outside of working hours, such tests may provide Government officials with a periscope through which they can peer into an individual's behavior in her private life, even in her own home." *Jones v. McKenzie*, *supra*, 833 F.2d at 339.

The government's first asserted interest—that of ensuring fitness for duty—is severely weakened by the fact that urinalysis does not measure an employee's current impairment. Where there is no relationship between what a search is expected to produce and the governmental interest asserted to support the search, the search cannot be justified. *E.g.*, *NFFE v. Carlucci*, *supra*, 680 F. Supp. at 433-34; *AFGE* v. *Meese*, *supra*, slip op. at 15; *RLEA v. Burnley*, *supra*, 839 F.2d at 588. Since compulsory random urinalysis drug testing of the Department's employees would not prove that an employee is currently impaired, the governmental interest in the fitness of its employees for duty is not greatly served by such drug testing.

This reasoning applies equally to the government's argument that compulsory random urinalysis drug testing would have a deterrent effect upon illegal drug use among Department employees. There is simply no nexus between what the search is expected to produce and the governmental interest. The defendants' justifications for testing incumbents within each section of the Offices, Boards and Divisions of the Department of Justice portray an alarming picture of what *could* happen if an incumbent abused drugs. Fortunately, defendants have "no reason to believe that drug use is widespread in the Department of Justice." Department of Justice Drug Testing Program: What You Need to Know at 9. Given that defendants do not consider drug abuse to be widespread within the Department, however, it is impossible to argue that mandatory random urinalysis drug testing serves the purpose of deterring illegal drug use by trusted and apparently law-abiding employees. In other words, defendants cannot claim a compelling governmental interest in deterring something that poses no threat and therefore does not need to be deterred.

The government also asserts a "critical" interest in the security of sensitive and classified information and in the "integrity" and "public image" of the Department. The Court agrees that these are important interests. Again, however, there is simply no nexus between what the search is aimed at uncovering and the asserted governmental interests. Given the absence of a drug problem at the Department, it is difficult to see how security of sensitive information, or the integrity and public image of the Department would be much served by requiring compulsory random urinalysis drug testing of trusted and apparently law-abiding employees, all of whom have passed rigorous background investigations into their character and integrity, and many of whom have received high awards for their distinguished public service.

Many other conceivable forms of misconduct by plaintiffs *could* be harmful to the compelling governmental interests defendants assert. For example, an employee might embezzle, obstruct justice, or accept bribes. Such acts would clearly harm the integrity and public image of the government, yet no one could seriously argue that, absent any grounds to suspect misconduct, defendants would be justified in tapping that employee's telephone, censoring his mail or searching his home.

Plaintiffs have shown a strong likelihood of success on the merits of their claim that compulsory random urinalysis drug testing as proposed in defendants' drug testing program is an unreasonable search and seizure that violates the fourth amendment. The balance of equities favors maintaining the status quo. Because the Court has concluded that compulsory random urinalysis drug testing of plaintiffs would violate the fourth amendment, plaintiffs would suffer harm if the injunction were not granted. Defendants have no urgent need to implement their program by August 26, 1988, and would, at most, be inconvenienced by postponement of the program should the Court ultimately rule in defendants' favor. Another reason for maintaining the status quo is that the Supreme Court has agreed to review two drug testing cases. *NTEU v. von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988); *RLEA v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *cert. denied*, 56 U.S.L.W. 3831 (U.S. June 7, 1988). The Supreme Court's decision in those cases will likely control the ultimate disposition of this case. Based upon what has been stated, the Court also concludes that the public interest is well served by preliminary injunction. In sum, all criteria for issuance of a preliminary injunction have been satisfied. *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Transmit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). The Court shall issue an

Order accordingly. Defendants' motion to dismiss and for summary judgment is DENIED.

/s/ George H. Revercomb
GEORGE H. REVERCOMB
Judge

July 29, 1988
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 88-1766

MARK B. HARMON, *et al.*,
Plaintiffs,

v.

EDWIN MEESE III, *et al.*,
Defendants.

[Filed July 29, 1988]

ORDER

In accordance with the Memorandum issued this 29th day of July, 1988, it is hereby

ORDERED, that plaintiffs' motion for a preliminary injunction is GRANTED. Until further order of this Court, defendants are enjoined from implementing mandatory random drug testing by urinalysis in the Offices, Boards and Litigating Divisions of the Department of Justice under the "Department of Justice Drug-Free Workplace Plan."

/s/ George H. Revercomb
GEORGE H. REVERCOMB
Judge

STEPHEN H. SACHS, ESQ.
CARL WILLNER, ESQ.
STEPHEN M. CUTLER, ESQ.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037

ARTHUR SPITZER, ESQ.
ELIZABETH SYMONDS, ESQ.
American Civil Liberties Union
1400 20th Street, N.W.
Washington, D.C. 20036

BROOKE HEDGE, ESQ.
Federal Programs Branch
Civil Division
United States Department of Justice
Room 3525
10th & Constitution
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 88-1766

MARK B. HARMON, *et al.*,
Plaintiffs,

v.

EDWIN MEESE III, *et al.*,
Defendants.

[Filed July 29, 1988]

ORDER

Upon consideration of defendants' oral motion to make permanent the preliminary injunction issued by the Court this 29th day of July, 1988, and the lack of opposition thereto, it is hereby

ORDERED, that the motion is GRANTED, and that the preliminary injunction be made permanent.

/s/ George H. Revercomb
GEORGE H. REVERCOMB
Judge

STEPHEN H. SACHS, ESQ.
CARL WILLNER, ESQ.
STEPHEN M. CUTLER, ESQ.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037

ARTHUR SPITZER, ESQ.
ELIZABETH SYMONDS, ESQ.
American Civil Liberties Union
1400 20th Street, N.W.
Washington, D.C. 20036

JOHN R. BOLTON, ESQ.
ROBERT J. CYNKAR, ESQ.
MARY E. GOETTEN, ESQ.
PETER ROBBINS, ESQ.
U.S. Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 88-1766

MARK B. HARMON, *et al.*,
Plaintiffs,

v.

EDWIN MEESE III, *et al.*,
Defendants.

[Filed July 29, 1988]

ORDER

Upon consideration of defendants' motion to stay the preliminary injunction issued by the Court this 29th day of July, 1988, it is hereby

ORDERED, that the motion is DENIED for the reasons stated by the Court in its bench ruling.

/s/ George H. Revercomb
GEORGE H. REVERCOMB
Judge

STEPHEN H. SACHS, ESQ.
CARL WILLNER, ESQ.
STEPHEN M. CUTLER, ESQ.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037

ARTHUR SPITZER, ESQ.
ELIZABETH SYMONDS, ESQ.
American Civil Liberties Union
1400 20th Street, N.W.
Washington, D.C. 20036

JOHN R. BOLTON, ESQ.
ROBERT J. CYNKAR, ESQ.
MARY E. GOETTEN, ESQ.
PETER ROBBINS, ESQ.
U.S. Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-1766 (GHR)

MARK B. HARMON, *et al.*,
Plaintiffs,

v.

EDWIN MEESE III, Attorney General
of the United States, *et al.*,
Defendants.

DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given that the defendants in the above-captioned action appeal to the United States Court of Appeals for the District of Columbia Circuit from the district court's Order entered on July 29, 1988 granting a permanent injunction.

Respectfully submitted,

JOHN R. BOLTON
Assistant Attorney General

/s/ Robert J. Cynkar
ROBERT J. CYNKAR
Deputy Assistant Attorney
General

/s/ Mary E. Goetten
MARY E. GOETTEN

/s/ Peter Robbins
PETER ROBBINS
Attorneys, Department of
Justice
10th & Pennsylvania Ave., N.W.
Room 3539
Washington, D.C. 20530
Tel. (202) 633-3953
Attorneys for the Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 1988, the foregoing Defendants' Notice of Appeal was served by hand upon:

Stephen H. Sachs, Esq.
Carl Willner, Esq.
Stephen M. Cutler, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

/s/ Peter Robbins
PETER ROBBINS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

DATE: August 11, 1988

Dist. Ct. Civil No. 88-01766

U.S. Court Appeals No. 88-5265

RE: Harmon, Mark B., et al.
v. Meese, Edwin III, et al.

Copies of the notice of appeal and docket entries have been received from the District Court. The appeal has been docketed in this Court on this date pursuant to Federal Rule of Appellate Procedure 12(a). The appeal has been assigned the indicated docket number. All filings must contain this docket number as well as the signature of at least one member of the bar of *this* Court, a firm name, if applicable, and an address and telephone number.

Attached is a copy of an order entered this date. The order requires all parties to file certain documents within a specified time. Please read the order carefully.

Also, please read the other attachments carefully. They deal with recent revisions to the General Rules of this Court with which counsel may not be familiar.

Very truly yours,

CONSTANCE L. DUPRE
Clerk

By: /s/ Carmen A. Gooding
CARMEN A. GOODING
Deputy Clerk

Enclosures
Ltr 86-2
(August, 1987)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5265

MARK B. HARMON, *et al.*

v.

EDWIN MEESE, III, Attorney General
of the United States, *et al.*

[Filed Aug. 11, 1988]

ORDER

It appearing that this new case has been filed and docketed, it is

ORDERED that appellant(s) shall submit an original and three copies of the following documents on or before 09-12-88:

1. Docketing Statement and Appearance Form
2. Copy of the Decision of the District Court
3. Statement of the Issues to be Raised on Appeal
4. Certificate of Counsel (Gen. R. 11(a)(1))
5. A Report certifying that all necessary transcripts, if any, have been ordered, including the date when the transcript was ordered and a statement that satisfactory financial arrangements have been made with the Reporter. A copy of the Report shall be served on each Reporter.

It is FURTHER ORDERED that appellee(s) shall also submit a Certificate of Counsel pursuant to Gen. R. 11(a)(1), and an Entry of Appearance Form, within the same period.

It is FURTHER ORDERED that the parties shall file dispositive motions, if any, on or before 09-26-88. *See* Gen. R. (7)(i). Any procedural motion which would affect the calendaring of this case shall be filed on or before 09-12-88. The filing of the record on appeal and briefing are deferred pending further order.

It is FURTHER ORDERED that appellant shall file and serve a Final Report Concerning Transcripts within three (3) days of receipt of all transcripts ordered.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Fredriech A. Braun
FREDRIECH A. BRAUN
Deputy Clerk

Federal Register—Vol. 51, No. 180
Wednesday, September 17, 1986

PRESIDENTIAL DOCUMENTS

Executive Order 12564 of September 15, 1986

Drug-Free Federal Workplace

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society;

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater abstenteeism than their fellow employees who do not use illegal drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5 of the United States Code, section 290ee-1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. *Drug-Free Workplace.*

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Sec. 2. *Agency Responsibilities*

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Sec. 3. *Drug Testing Programs.*

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the

nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Sec. 4. *Drug Procedures.*

(a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through the agency's Employee Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to sub-

mit medical documentation that may support a legitimate use for a specific drug.

(c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.

(d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Sec. 5. *Personnel Actions.*

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, *provided that* such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counseling or rehabitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.

(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal

drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agences shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counseling or rehabilitaiton through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

(e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(f) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

(g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

Sec. 6. *Coordination of Agency Programs.*

(a) The Director of the Office of Personnel Management shall:

(1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;

(2) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program;

(3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;

(4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and

(5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal work force.

(b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order.

(c) Nothing in this shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory

authorities of the National Security Agency or the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

Sec. 7. *Definitions.*

(a) This Order applies to all agencies of the Executive Branch.

(b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2101(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.

(c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For purposes of this Order, the term "employee in a sensitive position" refers to:

(1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthi-

ness by an agency head under Section 4 of Executive Order No. 12356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

(e) For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2)).

(f) For purposes of this Order, the term "Employee Assistance Program" means agency-based counseling programs that offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment.

Sec. 8. *Effective Date.* This Order is effectively immediately.

/s/ Ronald Reagan

THE WHITE HOUSE,
September 15, 1986.

Editorial note: For the President's remarks of September 15 on signing EO 12564, see the *Weekly Compilation of Presidential Documents* (vol. 22, no. 38).

DEPARTMENT OF JUSTICE
DRUG-FREE WORKPLACE PLAN [1]

CERTIFIED

Dated: September 25, 1987

Amendments Approved: December 17, 1987

---

[1] Amended pursuant to Inter-Agency Coordinating Group Requirements for Certification under Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. § 7301 note (1987).

CHAPTER 1

GENERAL PROVISIONS

A. *Purpose*

This order:

a. Declares that the use of illegal drugs by all Department of Justice (DOJ) employees, on or off duty, will not be tolerated;

b. Establishes the DOJ Drug-Free Workplace Plan, required under Section 2(b) of Executive Order 12564, consistent with Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. § 7301 note (1987), (hereafter cited as "the Act");

c. Sets forth objectives, policies and implementation guidelines for the DOJ Drug-Free Workplace Plan; and,

d. Provides procedures to govern implementation of the Plan including procedures to identify illegal drug users through drug testing on a controlled and carefully monitored basis.

B. *Background*

On September 15, 1986, the President signed Executive Order 12564, Drug-Free Federal Workplace, establishing a policy against the use of illegal drugs by Federal employees, whether on duty or off duty. In a letter to all executive branch employees dated October 4, 1986, the President, reiterated his goal of ensuring a safe and drug-free workplace for all federal workers.

The Executive Order recognized that illegal drug use is seriously impairing a portion of the national work force, resulting in the loss of billions of dollars each year. As the largest employer in the nation, the federal government has a compelling proprietary interest in establishing

reasonable conditions of employment. Prohibiting employee drug use is one such condition. The DOJ is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity. The intent of the policy is to offer a helping hand to those who need it, while sending a clear message that any illegal drug use is, quite simply, incompatible with federal service.

On July 11, 1987, Congress passed legislation affecting implementation of the Executive Order under Section 503 of the Act, in an attempt to establish consistency among federal agency drug testing plans, reliable and accurate drug testing, employee access to drug testing records, confidentiality of drug testing results, and continued, centralized oversight of the Federal Government's drug testing program. Although the Bureau of Prisons, Drug Enforcement Administration, Federal Bureau of Investigation, and Immigration and Naturalization Service are exempt from complying with this Act under § 503(b)(1)(D), the Offices, Boards, Litigating Divisions and U.S. Marshals are not exempt under that provision.

The DOJ, as a result of its law enforcement responsibilities, as well as the sensitive nature of its work, has an especially compelling obligation to eliminate illegal drug use from its workplace. Employees who work for an agency whose mission is to uphold and enforce the law, should not themselves violate the law.

The DOJ has a compelling interest, for example, in ensuring that employees of the Bureau of Prisons are drug-free in order to maintain a drug-free federal prison system.

Similarly, the Drug Enforcement Administration has a compelling interest in ensuring that its agents—who enforce drug interdiction laws—will themselves be drug-free.

Likewise, employees of the Federal Bureau of Investigation must foster public trust by earning and sustaining their reputation for integrity and honesty. Particularly in view of the FBI's law enforcement and national security responsibilities, illegal drug use is wholly incompatible with the FBI mission and purpose.

Equally significant, the United States Marshals Service is responsible for maintaining security and order in our nation's federal courts, as well as for protecting witnesses.

The Immigration and Naturalization Service has law enforcement responsibilties for controlling our nation's borders and apprehending and interdicting illegal drugs and criminal aliens as they enter the country.

Finally, attorneys with the DOJ hold positions of high public trust requiring them, as a condition of employment and as a measure of their position sensitivity, to pass full-field FBI background investigations before permanent offers of employment are extended. Moreover, they have access to classified and other sensitive information.

The mark of a successful drug-free workplace program depends on how well the Department can inform its employees of the hazards of drug use, and on how much assistance it can provide drug users. Equally important is the assurance to employees that personal dignity and privacy will be respected in reaching the Department's goal of a drug-free workplace. Therefore, this plan includes policies and procedures for: (1) employee assistance; (2) supervisory training; (3) employee education; and (4) identification of illegal drug use through drug testing on a carefully controlled and monitored basis.

C. *Nature, Frequency, and Type of Drug Testing to be Instituted*

Section 503 of the Act requires the DOJ Plan to specify the nature, frequency, and type of drug testing to be instituted. The DOJ Plan includes the following types of

drug testing: (1) Applicant testing; (2) Random testing of sensitive employees in testing designated positions; (3) Reasonable suspicion testing; (4) Accident or unsafe practice testing; (5) Voluntary testing; and (6) Testing as part of or as a follow-up to counseling or rehabilitation.

The frequency of testing for random testing, voluntary testing, and follow-up testing is specified in each non-exempt Component Plan. The Attorney General reserves the right to increase or decrease the frequency of testing based on the Department's mission, availability of resources, and experience in the program, consistent with the duty to achieve a drug free workplace under the Executive Order.

D. *Drugs for Which Individuals Are Tested*

Section 503 of the Act requires the Offices Boards and Litigating Divisions (hereafter "OBDs") and the U.S. Marshals Service (hereafter "USMS") to specify the drugs for which individuals in the OBDs and USMS shall be tested. These are listed in these Component Plans.

E. *Scope*

This order shall be effective for the Federal Bureau of Investigation, the Drug Enforcement Administration, the Bureau of Prisons and the Immigration and Naturalization Service immediately. These DOJ components shall ensure that their drug testing programs implemented under this order comply with the mandatory guidelines published under § 503(a)(1)(A)(ii) of the Act, no later than 90 days after such mandatory guidelines take effect, except that any judicial challenge that affects such guidelines should not affect drug testing programs or plans subject to this paragraph.

When each Executive Branch agency as specified in Section 503(a)(2) of the Act has complied with the pro-

visions of Section 503(a) of the Act, this order shall be effective immediately for all other components of the Department, including each the OBD Office, Board and Division as defined in Chapter 1.H.3 of this order.

F. *Union Cooperation*

The active participation and support of labor organizations can contribute to the success of this program. Components shall seek ways in which recognized bargaining units representatives might assist in program implementation, such as in acquainting employees with rehabilitation facilities and by enhancing employee confidence in the program. Components shall continue to observe agreements already reached, include union representatives in general orientation programs, and continue to meet all obligations under Title VII of the Civil Service Reform Act of 1978.

G. *Supervisory Training*

Training will be provided for supervisors to assist in identifying and addressing illegal drug use by employees. Training may be accomplished through various means, including contracting out to private organizations, HHS courses, in-house training courses, and employee assistance program training in cooperation with designated EAP Administrators in the FBI, BOP, DEA, INS, U.S. Marshals and Justice Management Division, or other designated individual(s). Training will include information regarding referral of employees to the EAP, procedures and requirements for drug testing and signs of possible drug use. Such training will also include information to make supervisors more sensitive to employee drug behavior and help supervisors recognize and document facts that give rise to a reasonable suspicion that an employee may be using illegal drugs.

H. *Definitions*

1. Terms. Wherever appropriate, terms used are the same as terms used in the FPM Letter 792-16 and in the *HHS Guidelines.*

2. Component Heads refers to the following organizational heads:

Director, Federal Bureau of Investigation;

Administrator, Drug Enforcement Administration;

Director, Bureau of Prisons;

Commissioner, Immigration and Naturalization Service;

Director, United States Marshals Service; and

Assistant Attorney General for Administration (for all offices, boards and divisions).

3. Offices, Boards, and Divisions as used in this order refers to the organizations listed under those titles in 28 C.F.R. 0.1, including the U.S. Attorneys' offices, together with any DOJ organizations not part of INS, DEA, FBI, USMS or BOP.

4. Illegal Drugs means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

5. Management Official means an individual employed by DOJ in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of DOJ. 5 U.S.C. § 7103(a)(11).

6. Medical Review Official means the individual responsible for receiving laboratory results generated from the

DOJ Drug-Free Workplace Program who is a licensed physician with knowledge of substance abuse disorders and the appropriate medical training to interpret and evaluate all positive test results together with an individual's medical history and any other relevant biomedical information.

7. Random Testing means mandatory testing imposed without individualized suspicion that a particular individual is using illegal drugs. Random testing includes either uniform-unannounced testing of every employee occupying a testing designated position or a statistically random sampling of individuals occupying testing designated positions based on a neutral criterion, such as social security numbers.

8. Employees in Sensitive Positions means: (1) employees in positions designated by the Component head as Special Sensitive, Critical Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual, or employees in positions designated by the Component Head as sensitive in accordance with Executive Order No. 10450, as amended; (2) employees granted access to classified information pursuant to a determination of trustworthiness by the Attorney General under Section 4 of Executive Order No. 12356; (3) individuals serving under Presidential appointments; (4) law enforcement officers as defined in 5 U.S.C. § 8331(20), and 8401(17); or (5) Other positions that the Attorney General determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

9. Supervisor means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such

action, if the exercise of the authority is not merely routine or clerical in nature, but requires the consistent exercise of independent judgment. 5 U.S.C. § 7103(a)(10).

10. Testing Designated Positions means position which have been designated for random testing pursuant to the procedures in Chapter 4.B of this Order. Employees occupying "sensitive" positions additionally must be designated as occupying "testing designated positions" before random testing of their position may commerce.

11. Verified Positive Test Result means a test result that has been screened positive by an FDA-approved immunoassay test, confirmed by a Gas Chromatography/Mass Spectrometry assay, (or other confirmatory tests approved by HHS), evaluated by the Medical Review Official and determined by him to be unjustified under Section 6.E. of this order.

J. *References*

1. Authorities

a. Executive Order 12564;

b. Executive Order 10450;

c. Executive Order 12356;

d. Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. § 7301 note (1987);

e. Scientific and Technical Guidelines For Drug Testing Programs, Alcohol, Drug Abuse and Mental Health Administration (ADAMHA), Department of Health and Human Services (HHS), as amended;

f. Standards for Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies, Alcohol, Drug Abuse and Mental

Health Administration (ADAMHA), Department of Health and Human Services(HHS), as amended;

g. Civil Service Reform Act of 1978, P.L. 95-454;

h. 42 CFR Part 2, establishing requirements for assuring the confidentiality of alcohol and drug-abuse patient treatment records;

i. The Privacy Act of 1974 (5 U.S.C. Section 552a), prescribing requirements governing the maintenance of records by agencies pertaining to the individuals and access to these records by the individual(s) to whom they pertain;

j. 49 CFR Part 10, implementing the Privacy Act of 1974 within the DOJ;

k. Federal Employees Substance Abuse Education and Treatment Act of 1986, P.L. 99-570.

2. Guidance

a. Office of Personnel Management (OPM), Federal Personnel Manual (FPM) Letters 792-16 (November 28, 1986), and 792-17 (March 9, 1987), setting forth guidelines for Federal civilian agencies in establishing a drug-free workplace pursuant to Executive Order 12564;

b. FPM Chapter 792, Federal Health and Counseling Programs, providing guidance to Federal agencies in establishing alcoholism and drug abuse programs (subchapter 5) and employee counseling services programs (subchapter 6) for Federal employees with alcohol or drug problems;

c. FPM Supplement, Chapter 792-2, providing guidance for developing and maintaining appropriate prevention, treatment and rehabili-

tation programs and services for alcoholism and drug abuse among Federal employees; and

d. DOJ Order 1792.1, May 15, 1978, and related authorities.

CHAPTER 2. NOTICE

A. *General Notice*

Section 4(a) of the Executive Order requires agencies to notify all employees of the testing program. The Attorney General has authorized each Component Head to issue a general notice to all employees within each respective component announcing the testing program of that component. Component Heads of the BOP, DEA, FBI, and INS, shall ensure that the general notices are provided to all their employees no later than sixty (60) days prior to the implementation date of a component plan. All other Component Heads shall provide general notices to their respective employees upon completion of the congressional certification procedures pursuant to §§ 503(a)(1)(A), 503(a)(1)(B), and 503(a)(1)(C) of the Act. Each notice shall:

a. Explain briefly the purpose of the Drug-Free Workplace Plan;

b. Notify all employees within the Component that the Drug-Free Workplace Plan will include both voluntary and mandatory testing;

c. Notify employees that those who hold positions selected for random testing will also receive an individual notice, prior to the comencement of testing, indicating that their position has been designated a "test designated position."

d. Inform employees that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through

Employee Assistance Program Administrators (EAP's) available to Component employees;

B. *Individual Notice*

Once designated by the Component Head pursuant to the procedures in Chapter 4.B of this Order, Component Heads shall distribute individual notices to those employees in a sensitive position designated for random testing in the Component prior to the commencement of such testing. The notice will:

a. Notify specific Component employees that their position has been designated a "test designated position;"

b. Explain briefly the purpose of the Drug-Free Workplace Plan;

c. Describe the circumstances under which testing may occur;

d. Indicate that positive test results verified by the Medical Review Officer will be protected under the provisions of the Privacy Act, 5 U.S.C. § 552a and for non-exempt Components, under § 503(e) of the Act, and that medical and rehabilitation records will be deemed confidential "patient" records that will be disclosed only in accordance with the prior written consent of the patient with respect to whom such record is maintained;

e. Indicate that the confirmatory test is highly reliable and difficult to dispute;

f. State the consequences of both confirmed positive test results and refusal to be tested;

g. Indicate that opportunity will be afforded to submit medical documentation of lawful use of an otherwise illegal drug;

h. Indicate that opportunity will be afforded the employee voluntarily to identify himself as a user of illegal drugs and to receive counseling or re-

habilitation, in which case disciplinary action is not required;

i. Announce that employees may seek counseling and rehabilitation and inform them of the procedure for obtaining such assistance through specified Employee Assistance Programs (EAP's), available to Component employees;

C. *Signed Acknowledgement*

Each employee in a testing designated position will be asked to acknowledge in writing that the employee has received and read the notice that the employee's position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal. Each notice will be signed by the employee and centrally collected for easy retrieval by the Component Head.

If the employee refuses to sign the acknowledgement, the employee's supervisor shall note on the acknowledgement form that the employee received the notice. This acknowledgement is advisory only. An employee's failure to sign the notice shall not preclude testing that employee, or otherwise affect the implementation of this order since the general sixty-day notice will previously have notified all DOJ employees of the requirement to be drug-free.

Notwithstanding any other provision in this DOJ Drug-Free Workplace Plan, the FBI is not required to issue general or individual notices to FBI employees who remain subject to the FBI drug testing program promulgated before September 15, 1986. However, all Component Heads, including the FBI shall provide every new DOJ employee as part of the regular personnel orientation program notice of the DOJ Drug-Free Workplace Plan.

D. *Administrative Relief*

If an employee believes his or her position has been wrongly classified a testing designated position (TDP), that employee may file an administrative appeal to the designated DOJ official who has authority to remove the employee from the TDP list. The appeal must be submitted by the employee, in writing, to the designated official within 15 days of notification, setting forth all relevant information. The designated official shall review the appeal based upon the criteria applied in designating that employee's position as a TDP. The official's decision is final and is not subject to further review.

CHAPTER 3. PROGRAM ADMINISTRATION

A. *Component Heads*

Component Heads are responsible for the implementation of the Drug-Free Workplace Plan within their component and for adherence to all requirements of Executive Order 12564 and § 503 of the Act. Each Component Head will assure that the following aspects of the Drug-Free Workplace Plan are efficiently and effectively accomplished in accordance with this order and all other applicable regulations.

B. *Field Implementation*

Each Component shall develop implementation procedures to enable DOJ field offices efficiently and swiftly to implement all aspects of this order, taking into account the unique geographical, personnel, budgetary and other relevant factors of the field offices.

Such procedures shall permit field office implementation to proceed independently of headquarters implementation. Testing may proceed under this order as soon as any field office or operating site is prepared to commence testing, and without regard to whether any other field

office or operating site or headquarters is prepared to commence testing.

Such procedures shall also encourage cooperation and coordination among components so as to conserve resources and efficiently implement this order.

C. *Drug Program Coordinator*

Each Component shall have a Drug Program Coordinator (DPC) assigned to carry out the purposes of this plan. The DPC shall be responsible for implementing, directing, administering, and managing the drug program within the Component. The DPC shall serve as the principal contact with the laboratory in assuring the effective operation of the testing portion of the program. In carrying out this responsibility, the DPC shall, among other duties:

1. Arrange for all testing authorized under this order;
2. Insure that all employees subject to random testing receive individual notice as described in Section 1(H) of this Plan; prior to implementation of the program, and that such employees return a signed acknowledgement of receipt form;
3. Document, through written inspection reports, all results of laboratory inspections conducted;
4. Coordinate with and report to the Component Head on DPC activities and findings that may affect the reliability or accuracy of laboratory results;
5. Ensure that the means of random selection in the random testing program remains confidential;
6. Evaluate periodically whether the numbers of employees tested and the frequency with which those tests will be administered satisfy DOJ's duty to achieve a drug-free work force;

7. In coordination with the EAP Administrator, publicize and disseminate drug program educational materials, and oversee training and education sessions regarding drug use and rehabilitation; and

8. Coordinate all DPC duties in field offices whereever possible to conserve resources and to efficiently and speedily accomplish reliable and accurate testing objectives.

D. *Procurement and Contract Administration*

Wherever existing facilities are inadequate to implement this order, the Component head shall:

1. Act as Contracting Officer for the administration of all related contracts;

2. Ensure that contractors chosen to perform the drug screening tests are duly certified pursuant to the HHS guidelines and that all contracts conform to the technical specifications of the HHS guidelines; and

3. Establish, by contract or with DOJ employees as deemed appropriate, the positions and specific responsibilities of the DPC and the MRO as required by the HHS guidelines.

E. *Medical Review Official*

Each Component shall have an MRO assigned to carry out the purpose of this Order. The MRO shall, among other duties:

1. Receive all laboratory test results;

2. Assure that an individual who has tested positive has been afforded an opportunity to justify the test result in accordance with Chapter 4.I of this Plan;

3. Consistent with confidentiality requirements, refer written determinations regarding all verified positive test results to the appropriate component official, including a positive drug test result form indicating that the positive result is "unjustified," together with all relevant documentation and a summary of findings;

4. Confirm with the appropriate personnel official whether an individual who has been tentatively selected for employment with the DOJ has obtained a verified positive test result;

5. Coordinate with and report to the Component Head on all activities and findings on a regular basis;

6. Coordinate all DPC duties in field offices wherever possible to conserve resources and to efficiently and speedily accomplish reliable and accurate testing objectives.

F. *Employee Assistance Program Administrator*

The FBI, DEA, BOP, INS, U.S. Marshals and Justice Management Division each have existing Employee Assistance Program Administrators. Among other duties, each Component's EAP shall:

(1) Provide counseling-referral and treatment-referral services to employees referred by themselves or through administrative channels for illegal drug use and monitor their prograss after rehabilitation;

(2) Conferring with the Component Head, the MRO and the employee's supervisors, as appropriate;

(3) Provide educational materials and training to managers, supervisors, and employees on illegal drugs in the workplace, including training on reasonable suspicion testing;

(4) Assist supervisors with performance and/or personnel problems that may be related to illegal drug use;

(5) Ensure that EAP is not involved in the collection of urine samples or the initial reporting of test results; and

(6) Ensure that confidentiality of test results and related medical treatment and rehabilitation records is maintained in accordance with Chapter 5 of this order.

G. *Supervisors*

Supervisors will be trained to recognize and address illegal drug use by employees, and will be provided information regarding referral of employees to the EAP, procedures and requirements for drug testing, and behavioral patterns that give rise to a reasonable suspicion that an employee may be using illegal drugs. Except as modified by the Component Head to suit specific program responsibilities, first-line supervisors shall:

1. Attend training sessions on illegal drug-use in the workplace;

2. Initiate a reasonable suspicion test, after first making appropriate factual observations and documenting those observations and obtaining approval from the second-line supervisor;

3. Refer employees to the EAP for assistance in obtaining counseling and rehabilitation, upon a finding of illegal drug use;

4. Initiate appropriate disciplinary action upon a finding of illegal drug use; and

5. In conjunction with personnel specialists, assist higher-level supervisors and the EAP Administrator in evaluating employee performance and or

personnel problems that may be related to illegal drug use.

A higher-level supervisor shall review and concur, in advance, with all reasonable suspicion tests ordered under his or her supervision.

H. *Disciplinary Proposing and Deciding Officials*

Disciplinary Proposing and Deciding Officials are responsible for:

1. Receiving all relevant evidence regarding verified positive test results; and
2. Taking appropriate disciplinary action consistent with the Executive Order and with DOJ order 1752.1A, "Discipline and Adverse Actions."

CHAPTER 4

IMPLEMENTATION REQUIREMENTS

A. *Selection of Individuals for Drug Screening Testing*

Upon the appropriate effective date of implementation, individuals may be selected for testing in the following categories:

1. Random Testing. Any sensitive DOJ employee who holds a testing designated position is subject to random testing. In addition to being subject to random testing, any probationary employee in a sensitive position may be directed to take a drug test during probation before an offer of permanent employment will be extended.
2. Voluntary Testing. Employees not in testing designated positions may volunteer for unannounced random testing by notifying the DPC. These employees will then be included in the pool of testing designated positions subject to random

testing, and be subject to the same conditions and procedures applicable to random testing. Volunteers shall remain in the TDP pool for the duration of the position which the employee holds, or until the employee withdraws from participation by notifying the DPC.

3. Reasonable Suspicion Testing. Reasonable suspicion testing may be based upon, among other things:

   (1) Observable phenomena, such as direct observation of drug use or possession and/or the physical symptoms of being under the influence of a drug;

   (2) A pattern of abnormal conduct or erratic behavior;

   (3) Arrest or conviction for a drug-related offense; or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking;

   (4) Information provided either by reliable and credible sources or independently corroborated; or

   (5) Evidence that the employee has tampered with a previous drug test.

Although reasonable suspicion testing does not require certainty, mere "hunches" are not sufficient to meet this standard.

4. Accident or Unsafe Practice Testing. Any employee involved in an accident or unsafe practice while on duty may be directed to take a drug test as part of an authorized examination into the accident or unsafe practice, and pursuant to criteria established by the Component Head.

5. Follow-up Testing. All employees referred through administrative channels who undergo counseling or rehabilitation programs for illegal drug use

will be subject to unannounced testing following completion of such a program for a period of one year. Such employees shall be tested at the amount stipulated in the abeyance contract, or, in the alternative, at a uniform increased frequency set by the Component Head. Such testing is distinct from testing which may be imposed as a component of EAP.

6. Applicant Testing. Drug testing is required for all individuals who are tentatively selected for DOJ employment at the commencement of authorized testing. Individuals seeking appointments to other sensitive DOJ positions may also be subjected to applicant testing. Upon the commencement of authorized testing, each Component Head shall ensure:

   (a) That every DOJ vacancy announcement shall contain the following announcement: "All applicants for this position will be required to submit to urinalysis to screen for illegal drug use prior to appointment;" although failure of the announcement to contain this notice will not preclude testing if advance written notice is provided applicants in some other fashion;

   (b) That each individual who is tentatively se-selected for a position will be notified that appointment to the position will be contingent upon the receipt of a negative drug test result; and

   (3) That applicants to be tested shall be directed to an appropriate collection facility, and tested as soon after notification as possible, but no less than within 48 hours of notice. Where appropriate, applicants may be re-reimbursed for reasonable travel expenses.

B. *Designating the Testing Designated Position*

The Executive Order requires random testing for employees in sensitive positions that have been designated as testing designated positions. Each Component Head additionally must determine which Component employees in sensitive positions occupy a testing designated position that will be randomly tested. Except for the BOP, DEA, FBI, and INS, each Component Head must specify the criteria and procedures to be applied in designating positions for drug testing, including the justification for such criteria and procedures as required under Section 503 of the Act. A position will be deemed "testing designated" when the Attorney General approves either:

1. A written Component Plan submitted by the Component Head, which Plan lists or otherwise describes the testing designated positions;

2. A specific position or positions submitted by the Component Head after the submission of that Component Head's initial Plan.

Among the factors the Component Head shall consider in determining a testing designated position, are the extent to which the Component—

1. Considers its mission inconsistent with illegal drug use;

2. Is engaged in law enforcement;

3. Must foster public trust by preserving employee reputation for integrity, honesty and responsibility;

4. Has national security responsibilities;

5. Has drug interdiction responsibilities; or

The extent to which the position considered—

1. Authorizes employees to carry firearms;

2. Gives employees access to sensitive information;

3. Authorizes employees to engage in law enforcement;
4. Requires employees, as a condition of employment, to obtain a security clearance;
5. Requires employees to engage in activities affecting public health or safety;
6. Involves the prosecution of criminal cases;
7. Includes access to a controlled substance as defined by Section 802(6) of Title 21 of the United States Code; or
8. Involves the conduct of or access to grand jury proceedings.

The Attorney General reserves the right to add or delete positions determined to be testing designated positions pursuant to the criteria established in the Executive Order and this Plan. Moreover, pursuant to 42 U.S.C. 290ee-1(b)(2), and the pertinent provisions of the Federal Personnel Manual, the Attorney General has determined that all positions which have been or will be designated as testing designated positions under this plan are "sensitive positions," and are therefore exempted from coverage under 42 U.S.C. 290ee-1(b)(1) for Federal civilian employment or a Federal professional or other license or right solely on the basis of prior drug abuse.

C. *Notification of Selection*

Notification to employees of selection for random testing will be pursuant to procedures designed to:

1. Ensure that employees will not have premature notice that they have been randomly selected to be tested;
2. Allow for prompt rescheduling of employees randomly selected, but who obtain a legitimate deferral.

In any event, notification will occur the same day, preferably within two hours, of the scheduled testing.

D. *Deferral of Testing*

An employee selected for random drug testing may obtain a deferral of testing if the employee's first-line and second-line supervisors concur that a compelling need necessitates a deferral on the grounds that the employee is:

1. In a leave status (sick, annual, administrative or leave without pay);
2. In official travel status away from the test site or is about to embark on official travel scheduled prior to testing notification;

An employee whose random drug test is deferred will be subject to an unannounced test within the following 60 days.

E. *Failure to Appear for Testing.*

Failure to appear for testing without a deferral will be considered refusal to participate in testing, and will subject an employee to the range of disciplinary actions, including dismissal, and an applicant to the cancellation of an offer of employment. Employees will be advised of the possibility that disciplinary action will occur if they refuse to participate in the testing. If an employee fails to appear at the collection site at the assigned time, the collector shall contact the DPC to obtain guidance on action to be taken.

F. *Notice to Employees Tested Under Specific Conditions*

Employees tested pursuant to reasonable suspicion testing, accident or unsafe practice testing, or follow-up testing, must receive notice that they will be tested and the reason for such testing. Notification will occur the same day, preferably within two hours, of the scheduled testing.

G. *Technical Guidelines for Drug Testing*

The DOJ will adhere to all scientific and technical guidelines for drug testing programs promulgated by HHS consistent with the authority granted by E.O. 12564 and with the provisions of § 503 of the Act. To the extent that any of the procedures specified in this section are inconsistent with any of those specified in the Scientific and Technical Guidelines promulgated by the Department of Health and Human Services, or any subsequent amendment thereto, such HHS Guidelines or amendment shall supersede the procedures specified in this section, but only to the extent of the inconsistency.

H. *Privacy in Drug Testing*

The employee or applicant to be tested will provide his or her sample in a rest room stall or similar enclosure so that the employee is not being observed while providing the sample. Observation is permitted, however, when there is reason to believe a particular individual may alter or substitute the specimen provided. Reasons to believe a person may alter or substitute the specimen include, but are not limited to:

1. The individual is being tested pursuant to Chapter 4.A.3, relating to reasonable suspicion testing;
2. The individual has previously been found by the EPA to be an illegal drug user;
3. The individual has previously tampered with a sample;
4. Facts and circumstances suggest that the individual—
   a. is an illegal drug user;
   b. is under the influence of drugs at the time of the test; or
   c. has equipment or implements capable of tampering or altering urine samples.

I. *Opportunity to Justify a Positive Test Result*

1. When a confirmed positive result has been returned by the laboratory, the MRO shall perform the duties set forth in the HHS Guidelines. For example, the MRO may choose to conduct employee medical interviews, review employee medical history, or review any other relevant biomedical factors. The MRO must review all medical records made available by the tested employee when a confirmed positive test could have resulted from legally prescribed medication.

   Evidence to justify a positive result may include, but is not limited to:

   (a) A valid prescription.

   (b) An affidavit from the employee's physician verifying a valid prescription.

2. Individuals are not entitled, however, to present evidence to the MRO in a trial-type administrative proceeding, although the MRO has the discretion to accept evidence in any manner the MRO deems most efficient or necessary.

3. If the MRO determines there is no justification for the positive result, such result will then be considered a verified positive test result. The MRO shall immediately contact the EAP Administrator upon obtaining a verified positive test result.

J. *Refusal to Take Drug Test When Required*

1. An employee who refuses to be tested when so required will be subject to the full range of disciplinary action, including dismissal.

2. No applicant who refuses to be tested shall be extended an offer of employment.

3. Attempts to alter or substitute the specimen provided will be deemed a refusal to take the drug test when required.

K. *Finding of Drug Use and Disciplinary Consequences*

1. Drug Use Determination. An employee may be found to use illegal drugs on the basis of any appropriate evidence including, but not limited to:

   (a) Direct observation;

   (b) Evidence obtained from an arrest or criminal conviction;

   (c) A verified positive test result; or

   (d) An employee's voluntary admission.

2. Employees in Sensitive Positions. DOJ shall not allow an employee to remain on duty in a sensitive position after being found to use illegal drugs, prior to successful completion of rehabilitation through an EAP. However, as part of an EAP, the Component Head may, in his discretion, allow an employee to return ot duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or national security.

3. Range of Consequences. DOJ shall initiate action to discipline any employee who is found to use illegal drugs except that DOJ is not required to initiate any disciplinary action against an employe who voluntarily identifies himself as a user of illegal drugs prior to being identified through other means, obtains counseling or rehabilitation, and thereafter refrains from using illegal drugs. such disciplinary action, consistent with the requirements of the Civil Service Refrom Act and other statutes and regulations, may include any

of the following measures, but some disciplinary action must be initiated:

(a) Reprimanding the employee in writing;

(b) Placing the employee in an enforced leave status, if the employee so requests;

(c) Suspending the employee for fourteen days or less;

(d) Suspending the employee for 15 days or more;

(e) Suspending the employee until such time as he or she successfully completes counseling or rehabilitation or until the Department determines that action other than suspension is more appropriate;

(f) Removing the employee from the service.

DOJ shall refer an employee found to use illegal drugs to an EAP. Such referral, however, does not preclude initiation of disciplinary proceedings.

4. Initiation of Mandatory Removal From Service. The DOJ shall initiate action to remove an employee for:

a. Refusing to obtain counseling or rehabilitation through an Employee Assistance Programs as required by the Executive Order after having been found to use illegal drugs;

b. Having been found not to have refrained from illegal drug use after a first finding of illegal drug use.

5. Voluntary Referral.

(a) Under Executive Order 12564, the DOJ is required to initiate action to discipline any employee found to use illegal drugs in every

circumstance except one. If an employee (1) voluntarily admits his or her drug use; (2) completes counseling or an EAP; and (3) and thereafter refrains from drug use, such discipline "is not required."

(b) The decision whether to discipline a voluntary referral will be made by the Component Head on a case-by-case basis depending upon the facts and circumstances. Although an absolute bar to discipline cannot be provided for certain positions because of their extreme sensitivity, the DOJ, in determining whether to discipline, shall consider that the employee has come forward voluntarily.

(c) Moreover, in coming forward, and consistent with Chapter 4.A.2, an employee may volunteer for a drug test as a means of self-identification. Although this self-identification test may yield a verified positive test result, such test result shall merely constitute an identification for purposes of this Section.

L. Employee Counseling and Assistance

1. DOJ shall continue its sponsorship of an EAP program which includes programs for referrals drug abuse prevention and treatment and for the rehabilitation of employees with drug use problems.

2. While participating in a counseling or rehabilitation program, and at the request of the program, the employee may be exempted from the random testing designated position pool for a period not to exceed sixty days, or for a time period specified in an abeyance contract or rehabilitation plan approved by the Component Head. Upon completion of the program, the employee immediately

shall be subject to follow-up testing pursuant to Chapter 4.A.5.

CHAPTER 5. RECORDS AND REPORTS

A. *Confidentiality of Test Results*

The laboratory may disclose confirmed laboratory test results only to the MRO or the staff of the MRO. Any positive result which the MRO justifies by licit and appropriate medical or scientific documentation to account for the result as other than the intentional ingestion of an illegal drug will be treated as a negative test result and may not be released for purposes of identifying illegal drug use. Test Results will be protected under the provisions of the Privacy Act, 5 U.S.C. § 552a, et seq. Additionally, for the OBDs and USMS, test results will be protected under Section 503(e) of the Act, and may not be released in violation thereof. The MRO or the staff of the MRO may maintain only those records necessary for compliance with this order. Any records of the MRO, including drug test results, may be released to any supervisor or management official for purposes of auditing the activities of the MRO, except that the disclosure of the results of any audit may not include personal identifying information on any employee.

In order to comply with Section 503(e) of the Act, the results of a drug test of a DOJ employee may not be disclosed without the prior written consent of such employee, unless the disclosure would be—

1. To the MRO;
2. To the EAP Administrator in which the employee is receiving counseling or treatment or is otherwise participating;
3. To any supervisory or management official within the DOJ having authority to take adverse personnel action against such employee; or

4. Pursuant to the order of a court of competent jurisdiction or where required by the United States Government to defend against any challenge against any adverse personnel action.

For purposes of this Section, "management official" includes any management or government official whose duties necessitate review of the test results in order to process adverse personnel action against the employee. In addition, test results with all identifying information removed shall also be made available to DOJ personnel, including the DPC, for data collection and other activities necessary to comply with Section 503(f) of the Act.

B. *Test Results*

Any employees who are the subject of a drug test under this order shall, upon written request, have access to:

1. Any records relating to such employee's drug test; and

2. Any records relating to the results of any relevant certification, review, or revocation-of-certification proceedings, as referred to § 503(a)(1)(A)(iii)(III) of the Act.

Except as authorized by law, an applicant who is the subject of a drug test, however, shall not be entitled to this information.

C. *Confidentiality of Records in General*

All drug testing information specifically relating to individuals is confidential and should be treated as such by anyone authorized to review or compile program records. In order to efficiently implement this order and to make information readily retrievable, the DPC shall maintain all records relating to reasonable suspicion testing, suspicion of tampering evidence, and any other authorized documentation necessary to implement this order.

All records and information of the personnel actions taken on employees with verified positive test results should—where appropriate—be forwarded to the Labor Management Relations Section. Such records shall remain confidential, locked in a combination safe, with only authorized individuals who have a "need-to-know" having access to them.

D. *Employment Assistance Program Records*

The EAP Administrator shall maintain only those records necessary to comply with this order. After [an operating unit head] refers an employee to an EAP, the EAP will maintain all records necessary to carry out its duties. All medical and or rehabilitation records concerning the employee's drug abuse, including EAP records of the identity, diagnosis, prognosis, or treatment are confidential and may be disclosed only as authorized by 42 C.F.R. Part 2, including the provision of written consent by the employee. With written consent, the patient may authorize the disclosure of those records to the patient's employer for verification of treatment or for a general evaluation of treatment progremss. (42 C.F.R. § 2.1 et seq. (1986), revised regulations promulgated at 52 F.R. 21796, June 9, 1987).

E. *Maintenance of Records in General*

All drug testing records must be maintained with due regard to applicable federal laws, rules and regulations regarding confidentiality of records including the Privacy Act, 5 U.S.C. § 552a and § 503 of the Act. All drug testing records shall be maintained for at least three years. If necessary, records may by maintained as required by subsequent administrative or judicial proceedings, or at the discretion of the Component head. The record keeping system should capture sufficient documents to meet the operational and statistical needs of this order, and include:

1. Notices of verified positive test results referred by the MRO;
2. Written materials justifying reasonable suspicion testing or evidence that an individual may have altered or tampered with a specimen;
3. Anonymous statistical reports; and
4. Other documents the DPC, MRO, or EAP Administrator deems necessary for efficient compliance with this order.

F. *Records Maintained By Government Contractors*

Any Component that hires a contractor to satisfy any part of this order shall require as part of the contract that all drug testing records maintained by the contractor comply with the confidentiality requirements of this order, § 503 of the Act, applicable federal laws, rules, regulations and guidelines.

G. *Statistical Information*

The DPC shall collect and compile anonymous statistical data for reporting the number of—

1. Random tests, reasonable suspicion tests, accident or unsafe practice tests, follow-up tests, or applicant tests administered;
2. Verified positive test results;
3. Voluntary drug counseling referrals;
4. Involuntary drug counseling referrals;
5. Terminations or denial of employment offers resulting from refusal to submit to testing;
6. Terminations or denial of employment offers resulting from alteration of specimens;
7. Terminations or denial of employment offers resulting from failure to complete a drug abuse counseling program; and
8. Employees who successfully complete EAP.

This data, along with other pertinent information, shall be compiled for inclusion in DOJ's annual report to Congress required by Section 503(f) of the Act. This data shall also be provided to HHS semi-annually to assist in overall program evaluation and to determine whether changes to the HHS Guidelines may be required.

Amendments
Approved:

/s/ Edwin Meese III
EDWIN MEESE III
Attorney General

Date: 17 Dec 87

DEPARTMENT OF JUSTICE

Order
OBD 1792.1
Jun. 27, 1988

Subject: DRUG-FREE WORKPLACE PROGRAM FOR THE OFFIES, BOARDS AND DIVISIONS

1. *PURPOSE.* This order establishes policy and procedures for the Drug-Free Workplace Program (hereinafter referred to as the OBD Program) for:

   a. Employee assistance.

   b. Supervisory training.

   c. Employee education.

   d. Identification of illegal drug use through drug testing on a carefully controlled and monitored basis.

2. *SCOPE.* When each Executive Branch agency, as specified in Section 503(a)(2) of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. § 7301 note (1987), (hereinafter referred to as the Act, has complied with the provisions of Section 503(a) of the Act, this order shall be effective immediately for the following organizations (for the purposes of this order, hereinafter referred to as OBDs):

   Office of the Attorney General
   Office of the Deputy Attorney General
   Office of the Associate Attorney General
   Office of the Solicitor General
   Office of Intelligence Policy and Review
   Office of Justice Programs
   Office of Legal Counsel
   Office of Legal Policy

Office of Legislative Affairs
Office of Liaison Services
Office of Professional Responsibility
Office of Public Affairs
Office of the Pardon Attorney
Executive Office for Immigration Review
Executive Office for United States Attorneys
United States Attorneys' Offices
Executive Office for United States Trustees
United States Trustees' Offices
Community Relations Service
Justice Management Division
Antitrust Division
Civil Division
Civil Rights Division
Criminal Division
Tax Division
Land and Natural Resources Division
United States Parole Commission
International Criminal Police Organizations—
United States National Central Bureau

3. *AUTHORITY.* Executive Order 12564, the Act, 21 U.S.C. § 802(b), and the Department of Justice Drug-Free Workplace Plan dated September 25, 1987, as amended on December 17, 1987 (hereinafter referred to as the DOJ Plan).

4. *REFERENCES.* This order incorporates Departmental policy in the following program areas: discipline and adverse action, employee assistance and personnel security.

5. *POLICY.* It is the policy of the Department of Justice to achieve a drug-free workplace. The specific objectives, procedures and guidelines of this order are applicable solely within the OBDs listed in paragraph 2 of this order and are set forth to achieve a drug-free workplace.

6. *DEFINITIONS.*

   a. *Applicant* means any individual tentatively selected for employment with the OBDS and includes any individual in the OBDs who has tentatively been identified for placement in a testing designated position (TDP) and who has not, immediately prior to the placement, been subject to random testing.

   b. *Employee Assistance Program (EAP)* means the OBD-based counseling program that offers assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol and mental health problems, and monitors their progress while in treatment.

   c. *Employee Assistance Program Administrator (EAPA)* means the individual responsible for ensuring the development, implementation and review of the agency EAP.

   d. *Testing Designated Position* means positions within the OBDs which have been designated for random testing under Chapter 4, Section 6.B of the DOJ Plan, and paragraph 11a and 2 of this order.

7. *RESPONSIBILITIES.*

   a. *Assistant Attorney General for Administration (AAG/A).* The AAG/A shall be the component head for purposes of this order and may delegate that authority. The AAG/A shall oversee the OBD Program and make final determinations for the OBDs on challenges to TDP classifications under Chapter 2.D of the DOJ Plan.

   b. *Deputy Assistant Attorney General/Information and Administrative Services (DAAG/IAS).* The DAAG/IAS shall supervise the Drug Program Coordinator (DPC) and maintain supervisory

oversight over the OBD Program. The DAAG/IAS shall assure that necessary resources are provided to the DPC for the administration of the OBD Program.

c. *Deputy Assistant Attorney General/Controller (DAAG/C).* The DAAG/C shall provide necessary logistic support to the OBD Program including the generation and maintenance of the random pools and lists to be used in random testing selections.

d. *Drug Program Coordinator (DPC).*

(1) The OBDs shall have a DPC assigned to carry out the OBD Program. The DPC shall be responsible for implementing, directing, administering and managing the drug testing program within the OBDs. In addition, the DPC shall serve as the Contracting Officer's Technical Representative (COTR) and the principal contact with the laboratory in assuring the effective operation of the testing aspect of the OBD Program.

(2) In addition to those duties set forth in Chapter 3.C of the DOJ Plan, the DPC shall:

(a) Implement the OBD Plan under the supervision of the DAAG/IAS.

(b) Coordinate with and report to the DAAG/IAS on information and findings that may affect the reliability or accuracy of laboratory results.

(c) Confirm with the appropriate personnel official to determine whether an OBD applicant has been found to be drug-free.

(d) Assure that applicants with verified positive test results are not hired by the OBDs and that current employees with verified positive test results are taken out of testing designated positions during counseling or rehabilitation.

e. *Employee Assistance Program Administrator.* In addition to those duties set forth in Chapter 3.F of the DOJ Plan, the EAPA shall:

(1) Coordinate with the DPC, the Medical Review Officer (MRO) and supervisors, as appropriate.

(2) Work with the DPC to provide educational materials and training developed under the OBD Program to managers, supervisors and employees.

(3) Ensure that training is provided to assist supervisors in the recognition and documentation of facts and circumstances that support a reasonable suspicion that an employee may be using illegal drugs.

(4) Upon receipt of a verified positive test result from the MRO, transmit the test result to the appropriate management official empowered to initiate disciplinary action.

f. *Supervisors.* Supervisors shall carry out those duties set forth in Chapter 3.G of the DOJ Plan.

g. *Government Contractors.* Wherever existing facilities are inadequate to implement this order, the DAAG/IAS shall:

(1) Delegate authority for the administration of all related contracts and ensure that contractors chosen to perform duties under this order meet the Health and Human Services

(HHS) Scientific and Technical Guidelines and laboratory certification standards.

(2) Establish, by contract or other procurement mechanism, the position and specific responsibilities of the MRO as required by the HHS guidelines.

h. *Medical Review Officer (MRO).* The MRO is responsible for receiving laboratory results generated from the DOJ Drug-Free Workplace Program who is a licensed physician with knowledge of substance abuse disorders and the appropriate medical training to interpret and evaluate all positive test results together with an individual's medical history and any other relevant biomedical information.

8. *TESTING ANNOUNCEMENT AND NOTIFICATION PROCEDURES.*

a. *General Announcement.* A general announcement from the AAG/A announcing the testing program shall be provided to all OBD employees upon completion of the certification procedures pursuant to Sections 503(a)(1)(A), 503(a)(1)(B), and 503(a)(1)(C) of the Act, which shall conform to Chapter 2.A of the DOJ Plan.

b. *Individual Notification.* In addition to the general announcement, an individual notification and acknowledgement shall be distributed to all employees in testing designated positions and shall conform to Chapter 2.B and 2.C of the DOJ Plan.

c. *Administrative Relief.* As provided in Chapter 2.D of the DOJ Plan, the AAG/A is the designated official.

9. *OBD TESTING DESIGNATED POSITIONS.* Pursuant to the requirements of Executive Order 12564

and the DOJ Plan, employees in the following position categories have been selected as testing designated positions in the CBDs.

a. All incumbents currently authorized to have access to top secret classified information in accordance with Executive Order 12356.

b. All attorneys responsible for conducting grand jury proceedings and all personnel deemed necessary to assist such attorneys in the performance of their duties.

c. All incumbents serving under Presidential appointments.

d. All incumbents whose assigned position duties include the prosecution of criminal cases.

e. All incumbents whose assigned position duties include maintaining, storing or safeguarding a controlled substance as defined by Section 802(6) of Title 21 of the United States Code.

10. *NATURE, FREQUENCY, AND TYPE OF DRUG TESTING TO BE INSTITUTED.*

a. Section 503 of the Act requires the OBD Program to specify the nature, frequency, and type of drug testing to be instituted. The OBD Program includes the following types of drug testing:

(1) Applicant testing.

(2) Random testing of sensitive positions in testing designated positions.

(3) Probationary employee testing.

(4) Reasonable suspicion testing.

(5) Accident or unsafe practice testing.

(6) Voluntary testing.

(7) Testing as part of or as a follow-up to counseling or rehabilitation.

b. Incumbents in TDPs will be tested at an annual frequency of 7%. Those employees with less than one year of federal service in TDPs and applicants will be tested at an annual frequency of 100%. The Assistant Attorney General for Administration reserves the right to increase or decrease the frequency of testing based on the OBD mission, needs, availability of resources, and experience in the OBD Program, consistent with the duty to achieve a drug-free workplace under the Executive Order.

c. Section 503 of the Act requires the OBDs to specify the drugs for which individuals shall be tested. These are: marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP).

11. *RANDOM TESTING.*

a. *Positions Designated for Random Drug Testing.* The titles of positions designated for random drug testing and the procedures applied in such designations have been established and disseminated to Executive Officers in the OBDs.

b. *Random Testing Procedures.* Random testing procedures shall be in accordance with Chapter 4.C, D, E, G, H, I and J of the DOJ Plan.

12. *REASONABLE SUSPICION TESTING.*

a. *Procedures.*

(1) If an employee is suspected of using drugs, consistent with Chapter 4.A.3 of the DOJ Plan, the appropriate supervisor, in consultation with the EAPA, shall gather all in-

formation, facts and circumstances leading to and supporting this suspicion. A higher-leveled supervisor shall concur in a reasonable suspicion determinaton prior to coordinating with the DPC for scheduling a test.

(2) Once reasonable suspicion has been established, the DPC shall ensure that the record contains the circumstances which formed the basis of the determination that reasonable suspicion exists to warrant the testing. The report shall include, at a minimum, the dates and times of reported incidents, sources of information and appropriate factual observations.

b. *Obtaining the Sample.* In accordance with Chapter 4.H.1 of the DOJ Plan, if there is reason to believe an individual being tested under reasonable suspicion may alter or substitute the specimen provided, then privacy need not be afforded.

13. *APPLICANT TESTING.*

a. *Objectives.* To maintain the high professional standards of the OBD workforce, it is imperative that individuals who use illegal drugs be screened out during the initial employment process before they are placed on the employment rolls of the OBD.

b. *Extent of Testing.* Drug testing shall be required of all OBD applicants as defined in paragraph 6a of this order.

c. *Procedures.*

(1) The processing personnel office shall direct applicants to an appropriate collection facility. The drug test shall be undertaken as soon after notification as practicable, and

within 48 hours of notification to the applicant. Where appropriate, applicants may be reimbursed for reasonable travel expenses.

(2) Applicants shall be advised of the opportunity to submit medical documentation that may support a legitimate use for a specific drug and that such information will be reviewed only by the MRO or the staff of the MRO to determine whether the individual is licitly using an otherwise illicit drug.

d. *Personnel Officials.* Upon notification that an individual has been tentatively selected for employment with the OBDs, the processing personnel office or DPC shall assure, after consultation with the MRO or the staff of the MRO, that a drug test has been conducted and that the result was negative.

e. *Consequences.* The OBDs shall decline to extend a final offer of employment to any applicant with a verified positive test result, and such applicant may not reapply for a period of six months. The Personnel Officer working on the applicant's certificate shall be directed to object to the applicant on the basis of failure to pass the physical, a lack of personal characteristics necessary to relate to public employment or failure to support the mission of the OBDs. The OBDs shall inform the applicant that a confirmed presence of drugs in the applicant's urine precludes the OBD from hiring the applicant.

14. *ADDITIONAL TYPES OF DRUG TESTING.*

a. *Accident or Unsafe Practice Testing.* The OBDs are committed to providing a safe and secure work environment. Employees involved in on-the-job accidents or who engage in unsafe on-duty

job-related activities that pose a danger to others or the overall operation of the OBDs, may be subject to testing. Based on the circumstances of the accident or unsafe act, the DPC may initiate testing when there is:

(1) Evidence of an unsafe practice.

(2) Significant damage to property.

(3) Careless operation of a vehicle.

(4) Significant injury to persons.

(5) A pattern of erratic incidents.

b. *Voluntary Testing.* Voluntary testing shall be conducted as provided under Chapter 4.A.2 and 4.K.5 of the DOJ Plan.

c. *Follow-up Testing.* All employees referred through administrative channels who undergo a couseling or rehabilitation program of illegal drug use through the EAP as a result of the drug testing program will be returned to the random testing pool following completion of such a program. In addition, these individuals will be placed in a follow-up pool where they will be subject to regular unannounced testing for a period of one year. Such employees shall be tested at the amount stipulated in the abeyance contract, or, in the alternative, at an increased frequency of ten times per year. Such testing is distinct from testing which may be imposed as a component of the EAP.

15. *TEST PROCEDURES.*

a. *General.* The OBDs shall comply with applicable test procedures specified in the DOJ Plan.

b. *Suspect Samples.* Collection site personnel shall retain any sample that shows evidence of tampering or substitution under the HHS Scientific

and Technical Guidelines. After consultation with the DPC and in accordance with Chapter 4.A.3 of the DOJ Plan, a second sample may be required under direct observation.

16. *FINDING OF DRUG USE AND DISCIPLINARY CONSEQUENCES.*

a. *Mandatory Administrative Actions.*

(1) Upon a finding of illegal drug use, action shall be taken as specified in Chapter 4.K of the DOJ Plan.

(2) As provided in Chapter 4.K.2 of the DOJ Plan, the AAG/A shall determine whether the employee may return to duty in a sensitive position.

b. *Range of Consequences.* The severity of the disciplinary action taken against an employee found to use illegal drugs will depend on the circumstances of each case, and will be consistent with the Executive Order and includes the full range of disciplinary actions, including removal. The OBDs shall initiate disciplinary action against any employee found to use illegal drugs but shall not discipline an employee who voluntarily admits to illegal drug use in accordance with the Voluntary Referral Provision in paragraph 16c of this order.

c. *Voluntary Referral.*

(1) Chapter 4.K.3 of the DOJ Plan permits the OBDs to create a SAFE HARBOR for an employee who voluntarily identifies himself/herself as a user of illegal drugs in accordance with Section 5(b)(1)-(3) of the Executive Order. Accordingly, the OBDs shall not initiate disciplinary action against any OBD employee who:

(a) Voluntarily identifies himself/herself as a user of illegal drugs prior to being identified through other means;

(b) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(c) Thereafter refrains from using illegal drugs.

(2) This self-referral option allows any employee to step forward and identify himself/herself as a user of illegal drugs for the purpose of obtaining counseling or rehabilitation.

(3) In stepping forward, and consistent with the voluntary testing provision in Chapter 4.A.2 of the DOJ Plan, an employee may also volunteer for a drug test as a means of self-identification. Although this self-identification test may yield a verified positive test result, such test result shall merely constitute an identification for purposes of this section.

(4) Since the key to this provision's rehabilitative effectiveness is an employee's self-identification prior to being identified through other means, this provision shall not be available to an employee who is required to provide a urine sample under this order or who is found to have used illegal drugs pursuant to Chapter 4.K.1(a), (b) or (c) of the DOJ Plan and who thereafter requests protection under this provision.

17. *EMPLOYMENT ASSISTANCE PROGRAMS.*

a. *Function.* The OBD EAP plays an important role in preventing and resolving employee drug use by: demonstrating the OBD commitment to eliminating illegal drug use; providing employees

an opportunity, with appropriate assistance, to discontinue their drug use; providing educational materials to supervisors and employees on drug use issues; assisting supervisors in confronting employees who have performance and/or conduct problems and making referrals to appropriate treatment and rehabilitative facilities; and following individuals during the rehabilitative-period to track their progress and encourage successful completion of the program. The EAP, however, shall not be involved in the collection of urine samples or the initial reporting test results. The purpose of the EAP is to:

(1) Provide counseling and assistance to employees who self-refer to treatment or whose drug tests have been confirmed positive, and monitor the employees' progress through treatment and rehabilitation.

(2) Provide needed education and training to all levels of the OBDs on types and effects of drugs, symptoms of drug use and its impact on performance and conduct, the relationship of the EAP to the drug testing program, and finally, treatment, rehabilitation, and records confidentiality requireemnts.

(3) Ensure that confidentiality of test results and related medical treatment and rehabilitation records is maintained in accordance with the confidentiality requirements of Chapter 5 of the DOJ Plan.

b. *Referral and Availability.* Any employee found ot use illegal drugs shall be referred to the EAP. The EAP shall be administered separately from the testing program in accordance with Order DOJ 1792.1, and be available to all employees without regard to a finding of drug use. The

EAP shall provide counseling of rehabilitation for all referrals, as well as education and training regarding illegal drug use. The EAP is available not only to OBD employees, but, when feasible, to the families of employees with drug problems, and to employees with family members who have drug problems.

c. *Leave Allowances.* Employees may be allowed up to one hour (or more as necessitated by travel time) of excused absence for each counseling session, during the assessment/referral phase of rehabilitation. Absences during duty hours for rehabilitation or treatment will be charged in accordance with applicable law leave regulations.

d. *Records and Confidentiality.* All EAP counseling, rehabilitation or drug testing records shall be maintained in compliance with the confidentiality requirements of this order, the DOJ Plan, Chapter 5, § 503 of the Act, applicable federal laws, rules, regulations and guidelines.

e. *Structure.* The AAG/A shall be responsible for oversight and implementation of the OBD EAP, and shall provide, with the support of the Attorney General, high level direction to and promotion of the EAP.

18. *SUPERVISORY TRAINING.*

a. *Objectives.* As supervisors have a key role in establishing and monitoring a drug-free workplace, training shall be provided to assist supervisors and managers in recognizing and addressing, with the assistance and expertise of the EAP, illegal drug use by OBD employees. The purpose of supervisory training is to understand:

(1) Departmental policies relevant to work performance problems, drug use, and the OBD EAP.

(2) The responsibilities of offering EAP services.

(3) How employee performance and behavior changes, should be recognized and documented.

(4) The respective roles of the MRO, supervisors, personnel officials, and EAP staff.

(5) The ways to use the OBD EAP.

(6) How the EAP is linked to the performance appraisal and the disciplinary processes.

(7) The process of reintegrating employees into the workforce.

b. *Implementation.* The Justice Management Division shall be responsible for implementing supervisory training, and shall develop a training package to ensure that all employees and supervisors are informed of the OBD Drug-Free Workplace Plan.

c. *Training Package.* Supervisory training shall be required for all supervisors and may be presented as a separate course, or be included as part of an on-going supervisory training program. Training shall be provided as soon as possible after a person assumes supervisory responsibility. Training courses should include:

(1) Overall Departmental policy.

(2) The prevalence of various employee problems with respect to drugs and alcohol.

(3) The EAP approach to handling problems.

(4) How to recognize employees with possible problems.

(5) Documentation of employee performance or behavior.

(6) How to approach the employee.

(7) How to use the EAP.

(8) Disciplinary action, and removals from sensitive positions as required by Section 5(c) of the Executive Order.

(9) Reintegration of employees into the workforce.

(10) Written materials which the supervisor can use at the work site.

19. *EMPLOYEE EDUCATION.*

a. *Objective.* The EAPA shall offer drug education to all OBD employees. Drug education shall include:

(1) Types and effects of drugs.

(2) Symptoms of drug use, and the effects on performance and conduct.

(3) The relationship of the EAP to the drug testing program.

(4) Other relevant treatment, rehabilitation, and confidentiality issues.

b. *Means of Education.* Drug education activities may include:

(1) Distribution of written materials.

(2) Videotapes and films.

(3) Lunchtime employee forums.

(4) Employee drug awareness days.

20. *RECORDS AND REPORTS CONFIDENTIALITY.*

All records and reports under this order shall be maintained in conformity with the confidentiality requirements of Chapter 5 of the DOJ Plan, § 503

of the Act, applicable laws, rules, regulations and guidelines.

/s/ Harry H. Flickinger
HARRY H. FLICKINGER
Assistant Attorney General
for Administration

Titles	*Location*
Chief	Legal Policy Section
Chief, Legal Advisory Unit	Antitrust Division
Chief, Legislative Unit	
Trial Attorney	
Secretary	

Incumbents in this section contribute to long-range planning projects, evaluate current Division programs, apply policy considerations to proposals for specific cases and investigations, and develop and support Division positions on legislative matters. They also advise employees on matters of professional ethics.

Decisions and performance influenced or impaired by illegal drug use could result in inconsistent or poorly conceived policy development and implementation, failure to identify problems and recommend improvements in the way the Division accomplishes its mission, and lack of initiative to make legislative or management changes to improve overall effectiveness. The ultimate result would be economic harm to American consumers and businesses, to the detriment of the overall economy. Drug usage could also result in mishandling of grand jury, sensitive, and security classified materials, compromising the integrity of the criminal investigation process, the government decision-making process, or national security interests.

Titles	*Location*
Chief	Criminal Section
Supervisory Trial Attorney	Civil Rights Division
General Attorney	
Trial Attorney	
Law Clerk	
Paralegal Specialist	
Legal Technician	
Secretary	
Clerk	

Incumbents in these positions are responsible for the investigation and prosecution of individuals alleged to have violated federal criminal civil rights statutes designed to preserve personal liberties; e.g., persons acting under color of law or in conspiracy with others to interfere with federally protected rights; persons holding individuals in peonage or involuntary servitude; or, the use of force or threats of force to injure or intimidate any person exercising certain federal rights and activities.

Drug usage could result in a significant loss of individual rights, personal safety and a serious breach of public trust. Illegal drug usage could result in the failure to appropriately handle allegations of criminal misconduct. For example, bizarre allegations of criminal misconduct against public officials and private individuals continue to occur, e.g., involuntary servitude/peonage of migrant workers. If these allegations had been received by an individual using illegal drugs, judgment may have impaired decision to forward for investigation and, ultimately, prosecution of this incident allowing for not only continued violations, but, possibly, increasing the number of individuals held involuntarily. Drug use could also jeopardize the level of secrecy required in grand jury preparation and presentation.

Titles	*Location*
Chief, Environmental Crimes Section	Environmental Crimes Section
Assistant Chief, Environmental Crimes Section	
Trial Attorney	
Paralegal Specialist	
Secretary (Typing)	
Clerk (Typing)	

Incumbents in this office evaluate, investigate, supervise and prosecute criminal cases related to the control and abatement of pollution to the nation's air and water resources, the regulation and control of toxic substances, pesticides and solid wastes. Incumbents prosecute criminal cases for violations of the criminal provisions of the Resources Conservation and Recovery Act, as amended, the Clean Water, Air and other statutes including traditional Title 18 offenses in conjunction with violations of those environmental statutes. Incumbents provide legal counseling to client agencies and the Federal Bureau of Investigation. Incumbents, under the direction of the Chief, prosecute criminal cases under environmental statutes administered by the Environmental Protection Agency, Army Corps of Engineers, the Coast Guard, Customs and the Department of Transportation and under Title 18 offenses related to those environmental statutes. In addition to prosecuting cases, incumbents provide support to the United States Attorneys Offices both in cases where the USAs have the lead and in jointly handled cases. Incumbents also coordinate among districts to assure consistency on common issues and assist the FBI and other investigating agencies in the investigation of alleged violations.

Drug usage by incumbents could have serious repercussions for the federal government. For example, if attorneys fail to vigorously carry out close investigations and prosecutions or to exercise sound judgment, serious

felonies may escape detection and prosecution. Also, drug use by incumbents could result in the disclosure of the identities of confidential sources and informants who could be subject to physical harm. The section has access to grand jury material and evidence which, if disclosed, would compromise criminal prosecutions.

Titles	*Location*
Solicitor General	Office of the Solicitor General
Deputy Solicitor General	
Trial Attorney	
Attorney Advisor	
Executive Assistant	
Administrative Staff Assistant	
Secretary *	
Staff Assistant *	

Incumbents in this office are responsible for conducting and supervising all aspects of government litigation in the Supreme Court of the United States. Incumbents also review every case litigated by the federal government that a lower court has decided against the United States to determine whether to appeal, and decide whether the United States should file a brief as *amicus curia* in any appellate court. A significant part of the work of OSG involves government agencies that have conducted lower court litigation themselves. In addition, many cases stem from activities of executive departments of the government.

Illicit drug use by incumbents could result in serious damage to the legal system and reputation of the United States. The integrity of the office is premised, above all, on respect for the law. It would be inconsistent with the mission of the office for its incumbents simultaneously to represent the United States before this nation's highest court while violating its criminal statutes. Such conduct would constitute a serious breach of the public trust. Mistakes caused thorough impaired judgement could prove extremely expensive to the to the American taxpayer. For example, the loss of a liability lawsuit by the Government could establish dangerous precedent and cost the Government incalculable sums of money.

---

* Only incumbents with a Top Secret security clearance.

OFFICES, BOARDS AND DIVISIONS (OBD)[1]
EMPLOYEE NOTICE

Jun. 27, 1988

SUBJECT: GENERAL NOTICE OF DRUG TESTING

Executive Order 12564, signed by President Reagan on September 15, 1986 establishes the policy of the United States Government to achieve a Drug-Free Federal Workplace. In a letter to all Executive Branch employees dated October 4, 1986, the President reiterated his goal of ensuring a safe and drug-free workplace for all Federal workers. The intent of the policy is to offer a helping hand to those who need it, while sending a clear message that any illegal drug use is, quite simply, incompatible with Federal service.

Pursuant to the Executive Order and the Department of Justice Drug-Free Workplace Plan, this notice provides each OBD employee information that the Plan includes both mandatory and voluntary urinalysis testing provisions. Random drug testing and applicant drug testing may begin no sooner than 60 days after this notice. Testing will be carried out in accordance with the DOJ Plan and the Mandatory Guidelines for Federal Workplace Drug Testing Programs. [*Federal Register*, Vol. 53, No. 69 (April 11, 1988)].

Employees who hold positions selected for random testing will receive an individual notice, prior to the commencement of testing, indicating that their position has been designated a "testing designated position." Individuals who wish to volunteer for drug testing should call 633-2233.

Since the primary purpose of this program is to achieve a drug-free workplace while offering a helping hand, OBD employees should be aware of the opportunity for

---

[1] Includes OBDs as defined in 28 CFR Subpart A § 0.1 and all U.S. Attorneys Offices and the Office of Justice Programs.

assistance provided by the Department of Justice Employee Assistance Program (EAP). Any OBD employee may seek counseling and rehabilitation by contacting the EAP at (FTS) 633-1846. In addition, the OBD Order contains a "safe harbor" provision designed to provide employees incentive to admit their illegal drug use and obtain help. Under this provision, any employee who (1) voluntary admits his/her illegal drug use prior to being notified for a drug test; (2) enters and successfully completes a drug treatment program; and (3) thereafter refrains from illegal drug use, will not be subject to disciplinary action.

/s/ Harry H. Flickinger
HARRY H. FLICKINGER
Assistant Attorney General
for Administration

SUPPLEMENTAL Q & A

1. Q: What are the circumstances under which testing may occur?

   A: Under the OBD Order drug testing may occur under these circumstances: (1) applicant testing (2) random testing of sensitive employees in testing designated positions; (3) reasonable suspicion testing; (4) accident or unsafe practice testing; (5) voluntary testing; and (6) testing as a follow-up to counseling or rehabilitation.

2. Q: What testing procedure will be followed under the OBD order?

   A: All testing will be done in accordance with the Scientific and Technical Guidelines established by the Department of Health and Human Services for federal drug testing. Samples will be collected using strict chain-of-custody procedures. Testing will only be done by certified laboratories. Although a screening test using an FDA-approved immunoassay test will be utilized, no test will be reported positive unless there has been a confirmation test by the highly accurate Gas Chromatography/Mass Spectrometry assay and there has been a thorough review by a Medical Review Officer (MRO). There will be privacy in the collection of samples, and confidentiality in the results. Under some circumstances, employees will be required to provide samples under direct observation.

3. Q: What procedure do I follow if I am taking prescription medication when called for drug testing?

   A: Before conducting a drug test, every employee will be given the opportunity to submit medical documentation that may support a legitimate use

for a specific drug. Prior to making a final decision to verify a positive test result, the Medical Review Officer shall give the individual an opportunity to discuss the test result with him/her. Further, the MRO is required to review all records provided by the tested employee when the test results could have resulted from legally prescribed medication. If the drug is lawfully prescribed, the MRO is required to report the test result as negative. Employees should also be careful to note non-prescription drugs used.

4. Q: What are the consequences for an employee who tests positive or refuses to be tested?

   A: The Department may not allow an employee found to use illegal drugs to remain on duty in a sensitive position. Every employee found to use illegal drugs will be referred to an Employee Assistance Program. The Executive Order requires the Department to initiate disciplinary action against an employee found to use illegal drugs. Such action may range from a written reprimand to removal. Upon a second finding of illegal drug use, removal is mandatory. An employee who refuses to be tested will be subject to the full range of disciplinary action, including removal.

5. Q: How can an employee voluntarily admit illegal drug use, gain assistance, and avoid discipline?

   A: Any OBD employee, prior to being notified to report to a collection facility for testing, who voluntarily admits his or her illegal drug use will be protected by a provision of the OBD Order called the "safe harbor." As specified in the Order's safe harbor provisions, if that employee successfully completes a drug counseling or rehabilitation program, and thereafter, refrains

from illegal drug use, no disciplinary action will be initiated.

6. Q: How and when may an employee appeal their designation of being in a Testing Designated Position?

   A: The employee may file an administrative appeal to the Assistant Attorney General for Administration (AAG/A) who has the authority to remove the employee from the TDP list. The appeal must be submitted by the employee in writing, within 15 days from the date he/she receives the specific notice, setting forth all relevant information. The appeal shall be reviewed based on the criteria applied in designating the position as a TDP. The AAG/A's decision is final and is not subject to further review. All determinations will be issued in writing and an employee who has filed an appeal will not be subjected to random testing until the appeal is answered in writing.

7. Q: How do I obtain counseling or rehabilitation for illegal drug use or other personal problems?

   A: Any OBD employee may seek counseling and rehabilitation for drug use. It is the policy of the Department to offer confidential assistance to employees who have personal problems, and to encourage employees to voluntarily seek assistance through the Employee Assistance Program (EAP). It is our hope that individuals who are using illegal drugs will not wait to be detected through urinalysis but, instead, will voluntarily seek assistance. By taking advantage of the SAFE HARBOR policy, as specified in the OBD Plan, every employee can avoid disciplinary consequences. Employees who need assistance are urged to see an EAP counselor immediately be-

fore testing commences, by contacting the EAP at (FTS) 633-1846.

8. Q: What arrangements will be made for an employee who is required to stay at the urinalysis collection facility, beyond normal duty hours?

   A: Any employee who is required to stay beyond normal duty hours is in a mandatory overtime situation and will be compensated for that time, like any other mandatory overtime situation. Furthermore, employees may be reimbursed for transportation home should the requirements to stay beyond normal duty hours cause an employee to alter their normal commuting arrangements. Employees will not be left stranded if they have no funds to pay for transportation (i.e., employees who are in carpools and would not normally pay for bus/cab).

9. Q: Whom can a JMD Bargaining Unit employee contact with questions about rights with respect to the OBD drug testing program?

   A: If a JMD employee has any questions about his/her rights as a bargaining unit employee with respect to this drug testing program, he/she may contact a representative of AFSCME Local #3097.

10. Q: How many drugs will be tested for under the OBD drug testing program?

    A: Five: marijuana, cocaine, opiates, amphetamines, and PCP.

11. Q: What does an employee's signature on the specific notice reflect?

    A: The signature is an acknowledgement that the employee has received and read the notice. The signature does not reflect agreement/disagree-

ment with the legality of the program, nor does an employee waive any appeal or grievance or judicial right that he/she may have with respect to participation in or challenging the results of drug testing.

12. Q: What will happen if an employee refuses to sign the individual notice?

    A: The employee's supervisor will sign the individual notice to document that the employee received a copy, and will have a witness sign the form also for the same reason as the supervisor signs it.

13. Q: What part does the Employee Assistance Program (EAP) play in drug testing?

    A: Although the EAP and drug testing program are administered separately, a primary goal of the drug-free workplace initiative is to offer a helping hand to employees with problems. The EAP is this "helping hand."

    The EAP is a confidential service designed to assess an individual's problem, provide short-term counseling and refer individuals in need of formal long-term treatment to outside accredited facilities. However, employees have the choice of using the EAP referral or their own therapeutic agency or program for the purposes of engaging in rehabilitation. Employees must properly participate in such program and agree to limited disclosure.

14. Q: Under what circumstances will an employee scheduled for a random test be granted a deferral?

    A: In accordance with DOJ Plan, Chapter 4.D, an employee selected for random drug testing may have the test deferred if the employee's first and

second line supervisors concur that a compelling need necessitates deferral. Compelling need can be based on the employee being in a leave status, an official travel status away from the test site, or about to embark on official travel scheduled prior to drug test notification. Additionally, an employee may be placed in a leave status following the notification of drug testing if a first and second line supervisor concur that a compelling need justifies granting such leave.

Any employee whose random drug test is deferred will be subject to an unannounced test within the following 60 days.

DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE
MONDAY, JUNE 27, 1988

AG
202-633-2007
(TDD) 202-786-5731

Attorney General Edwin Meese III today announced that the Department of Justice has issued 60-day notices to the employees in its Washington area components in connection with the Executive Order for a drug free workplace signed by President Reagan on September 15, 1986.

"The issuance of the 60-day notices is a major step in implementing the Executive Order and in achieving the President's goal of a drug-free federal workplace," Meese said.

Today's notices are being issued to the approximately 6,500 employees in office components at Justice Headquarters in Washington, with the exception being the United States Attorneys Offices and the Office of Justice Programs. Those organizations will be receiving their 60-day notices within the next several months.

The Order allows for "reasonable suspicion", "post-accident or unsafe practice" and "probationary" testing of all employees within these components. All applicants for employment in these components will also be subject to drug testing. In addition, the Plan provides for limited random drug testing of those employees within these components who hold sensitive positions. It also provides for referrals for counseling and treatment for employees found to be using illegal drugs, as well as follow-up testing as part of the employee assistance program.

Approximately 1,800 of the 6,500 employees hold sensitive positions subject to random testing, and will be tested at a frequency of seven percent, or 126 individuals, per year. These testing designated positions for random testing fall into at least one of the following categories:

—All employees currently authorized to have access to top secret classified information;

—All attorneys responsible for conducting grand jury proceedings and all personnel deemed necessary to assist such attorneys in the performance of their duties;

—All incumbents serving under Presidential appointments;

—All incumbents whose assigned position duties include the prosecution of criminal cases; and,

—All incumbents whose assigned position duties include maintaining, storing or safeguarding a controlled substance (evidence custodians).

Issuance of the notices means that random drug testing may begin as soon as 60 days from today. Each of the employees holding a testing designated position will receive an individual notice of that fact before random testing is to begin.

The Executive Order recognized that the federal government, being the largest employer in the Nation, can and should show the way towards achieving a drug free workplace through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the federal workplace.

"Every federal agency must work toward the goal of a drug free workplace, but it is doubly important for the agency with primary responsibility for enforcing the nation's laws, and especially the nation's drug laws, to ensure that its employees are drug free," Meese said.

"For any of our employees to use illegal drugs is to compromise the Department's law enforcement mission." Meese added.

"The use of illegal drugs could lead to the unauthorized disclosure of confidential information which could se-

riously harm national security, it can lead to lost productivity and mistakes in judgment, and it can make employees susceptible to blackmail or bribery.

"In order to have the public's cooperation in the war against drugs, it is crucial that the public be assured that those who enforce the laws are themselves upholding the law.

"Between now and the issuance of the individual notices, we plan to continue to educate our employees about the importance of being drug free and about the Department's drug free workplace plan," Meese said. "I encourage employees to read the educational materials provided to them with their 60-day notices and to ask their supervisors any questions they may have regarding implementation of the program."

"It is important for our employees and the general public to understand that the random testing called for in the Executive Order is designed to deter non-users from ever starting and to provide an incentive to those who are using to stop by enrolling in treatment through an employee assistance program.

"In many respects the federal government is catching up with those private employers who already have drug testing in place. Between 30 and 50 percent of the Fortune 500 companies currently have some form of employee drug testing program.

"But, we also hope to set an example for the rest of the country by providing the public with what we believe is a model plan which balances the employee's right to privacy with the employer's right to know that employees are drug free and thus fit for duty," Meese said.

The Department's educational materials emphasize aspects of the drug testing program that are designed to ensure absolute accuracy of the results, including a two-stage testing process, careful chain-of-custody requirements and oversight by a Medical Review Officer.

Executive Order 12564 declared that "The use of illegal drugs, on or off duty, by federal employees impairs the efficiency of federal departments and agencies, undermines the public confidence in them and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively."

With the issuance of the 60-day notices today, the offices, boards, and litigating divisions of the Departments of Justice join the Bureau of Prisons, the Office of Personnel Management, the Veterans Administration, and the Department of Transportation as federal government components that have issued notices and begun implementation of the Executive Order.

To date, federal courts that have addressed the question of drug testing in the workplace have split on the constitutionality of random testing, but U.S. Courts of Appeal have held random testing to be constitutional in all but one circuit.

The Supreme Court will hear arguments next term on the constitutionality of drug testing for Customs Service employees and for railroad workers.

MANDATORY GUIDELINES FOR FEDERAL WORKPLACE DRUG TESTING PROGRAMS

2.2 Specimen Collection Procedures.

(a) Designation of Collection Site. Each agency drug testing program shall have one or more designated collection sites which have all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and shipping or transportation of urine specimens to a certified drug testing laboratory.

(b) Security. Procedures shall provide for the designated collection site to be secure. If a collection site facility is dedicated solely to urine collection, it shall be secure at all times. If a facility cannot be dedicated solely to drug testing, the portion of the facility used for testing shall be secured during drug testing.

(c) Chain of Custody. Chain of custody standardized forms shall be properly executed by authorized collection site personnel upon receipt of specimens. Handling and transportation of urine specimens from one authorized individual or place to another shall always be accomplished through chain of custody procedures. Every effort shall be made to minimize the number of persons handling specimens.

(d) Access to Authorized Personnel Only. No unauthorized personnel shall be permitted in any part of the designated collection site when urine specimens are collected or stored.

(e) Privacy. Procedures for collecting urine specimens shall allow individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided.

(f) Integrity and Identity of Specimen. Agencies shall take precautions to ensure that a urine specimen not be adulterated or diluted during the collection procedure and that information on the urine bottle and in the record book can identify the individual from whom the specimen was collected. The following minimum precautions shall be taken to ensure that unadulterated specimens are obtained and correctly identified:

(1) To deter the dilution of specimens at the collection site, toilet bluing agents shall be placed in toilet tanks wherever possible, so the reservoir of water in the toilet bowl always remains blue. There shall be no other source of water (e.g., no shower or sink) in the enclosure where urination occurs.

(2) When an individual arrives at the collection site, the collection site person shall request the individual to present photo identification. If the individual does not have proper photo identification, the collection site person shall contact the supervisor of the individual, the coordinator of the drug testing program, or any other agency official who can positively identify the individual. If the individual's identity cannot be established, the collection site person shall not proceed with the collection.

(3) If the individual fails to arrive at the assigned time, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(4) The collection site person shall ask the individual to remove any unnecessary outer garments such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine specimen. The collection site person shall ensure that all personal belongings such as a purse or briefcase remain with the outer garments. The individual may retain his or her wallet.

(5) The individual shall be instructed to wash and dry his or her hands prior to urination.

(6) After washing hands, the individual shall remain in the presence of the collection site person and shall not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the specimen.

(7) The individual may provide his/her specimen in the privacy of a stall or otherwise partitioned area that allows for individual privacy.

(8) The collection site person shall note any unusual behavior or appearance in the permanent record book.

(9) In the exceptional event that an agency-designated collection site is not accessible and there is an immediate requirement for specimen collection (e.g., an accident investigation), a public rest room may be used according to the following procedures: A collection site person of the same gender as the individual shall accompany the individual into the public rest room which shall be made secure during the collection procedure. If possible, a toilet bluing agent shall be placed in the bowl and any accessible toilet tank. The collection site person shall remain in the rest room, but outside the stall, until the specimen is collected. If no bluing agent is available to deter specimen dilution, the collection site person shall instruct the individual not to flush the toilet until the specimen is delivered to the collection site person. After the collection site person has possession of the specimen, the individual will be instructed to flush the toilet and to participate with the collection site person in completing the chain of custody procedures.

(10) Upon receiving the specimen from the individual, the collection site person shall determine that it contains at least 60 milliliters of urine. If there is less than 60 milliliters of urine in the container, additional urine shall

be collected in a separate container to reach a total of 60 milliliters. [The temperature of the partial specimen in each separate container shall be measured in accordance with paragraph (f)(12) of this section, and the partial specimens shall be combined in one container.) The individual may be given a reasonable amount of liquid to drink for this purpose (e.g., a glass of water). If the individual fails for any reason to provide 60 milliliters of urine, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(11) After the specimen has been provided and submitted to the collection site person, the individual shall be allowed to wash his or her hands.

(12) Immediately after the specimen is collected, the collection site person shall measure the temperature of the specimen. The temperature measuring device used must accurately reflect the temperature of the specimen and not contaminate the specimen. The time from urination to temperature measurement is critical and in no case shall exceed 4 minutes.

(13) If the temperature of a specimen is outside the range of 32.5°-37.7°C/90.5°-99.8°F, that is a reason to believe that the individual may have altered or substituted the specimen, and another specimen shall be collected under direct observation of a same gender collection site person and both specimens shall be forwarded to the laboratory for testing. An individual may volunteer to have his or her oral temperature taken to provide evidence to counter the reason to believe the individual may have altered or substituted the specimen caused by the specimen's temperature falling outside the prescribed range.

(14) Immediately after the specimen is collected the collection site person shall also inspect the specimen to determine its color and look for any signs of contami-

nants. Any unusual findings shall be noted in the permanent record book.

(15) All specimens suspected of being adulterated shall be forwarded to the laboratory for testing.

(16) Whenever there is reason to believe that a particular individual may alter or substitute the specimen to be provided, a second specimen shall be obtained as soon as possible under the direct observation of a same gender collection site person.

(17) Both the individual being tested and the collection site person shall keep the specimen in view at all times prior to its being sealed and labeled. If the specimen is transferred to a second bottle, the collection site person shall request the individual to observe the transfer of the specimen and the placement of the tamperproof seal over the bottle cap and down the sides of the bottle.

(18) The collection site person and the individual shall be present at the same time during procedures outlined in paragraphs (f)(19)-(f)(22) of this section.

(19) The collection site person shall place securely on the bottle an identification label which contains the date, the individual's specimen number, and any other identifying information provided or required by the agency.

(20) The individual shall initial the identification label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her.

(21) The collection site person shall enter in the permanent record book all information identifying the specimen. The collection site person shall sign the permanent record book next to the identifying information.

(22) The individual shall be asked to read and sign a statement in the permanent record book certifying that the specimen identified as having been collected from him or her is in fact that specimen he or she provided.

(23) A higher level supervisor shall review and concur in advance with any decision by a collection site person to obtain a specimen under the direct observation of a same gender collection site person based on a reason to believe that the individual may alter or substitute the specimen to be provided.

(24) The collection site person shall complete the chain of custody form.

(25) The urine specimen and chain of custody form are now ready for shipment. If the specimen is not immediately prepared for shipment, it shall be appropriately safeguarded during temporary storage.

(26) While any part of the above chain of custody procedures is being performed, it is essential that the urine specimen and custody documents be under the control of the involved collection site person. If the involved collection site person leaves his or her work station momentarily, the specimen and custody form shall be taken with him or her or shall be secured. After the collection site person returns to the work station, the custody process will continue. If the collection site person is leaving for an extended period of time, the specimen shall be packaged for mailing before he or she leaves the site.

(g) Collection Control. To the maximum extent possible, collection site personnel shall keep the individual's specimen bottle within sight both before and after the individual has urinated. After the specimen is collected, it shall be properly sealed and labeled. An approved chain of custody form shall be used for maintaining control and accountability of each specimen from the point of collection to final disposition of the specimen. The date and purpose shall be documented on an approved chain of custody form each time a specimen is handled or transferred and every individual in the chain shall

be identified. Every effort shall be made to minimize the number of persons handling specimens.

(h) Transportation to Laboratory. Collection site personnel shall arrange to ship the collected specimens to the drug testing laboratory. The specimens shall be placed in containers designed to minimize the possibility of damage during shipment, for example, specimen boxes or padded mailers; and those containers shall be securely sealed to eliminate the possibility of undetected tampering. On the tape sealing the container, the collection site supervisor shall sign and enter the date specimens were sealed in the containers for shipment. The collection site personnel shall ensure that the chain of custody documentation is attached to each container sealed for shipment to the drug testing laboratory.

(3)

Supreme Court, U.S.
FILED
OCT 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-427

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARK B. HARMON, ET AL., PETITIONERS

v.

RICHARD L. THORNBURGH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

LEONARD SCHAITMAN
LOWELL V. STURGILL, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

17 pp

QUESTION PRESENTED

Whether the Department of Justice's "Drug Free Workplace Plan" for the Department's Offices, Boards, and Litigating Divisions violates the Fourth Amendment because it is purportedly unlikely to reveal evidence of work-related drug use and because urinalysis testing cannot dispositively establish on-the-job drug impairment.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
A. The Department of Justice Drug-Testing Program	2
B. The Present Controversy	7
Argument	9
Conclusion	13

TABLE OF AUTHORITIES

Cases:

AFGE v. *Dole*, 670 F. Supp. 445 (D.D.C. 1987), appeal docketed, No. 87-5117 (D.C. Cir. Dec. 11, 1987)	11
California v. *Rooney*, No. 85-1835 (June 23, 1987)	10
Carter v. *Carter Coal*, 298 U.S. 238 (1936)	12
Cincinnati Soap v. *United States*, 301 U.S. 308 (1937)	12
Coleman v. *PACCAR, Inc.*, 424 U.S. 1301 (1976)	9
Dames & Moore v. *Regan*, 453 U.S. 654 (1981)	12
National Treasury Employees Union v. *Carlucci*, 680 F. Supp. 416 (D.D.C. 1988)	11
Ohio v. *Price*, 360 U.S. 246 (1959)	9
Quirin, Ex parte, 317 U.S. (1942)	12
Railroad Retirement Board v. *Alton R.R.*, 295 U.S. 330 (1935)	12
The Three Friends, 166 U.S. 1 (1897)	12
United States v. *Mistretta*, No. 87-1904 (June 30, 1988)	12
United States v. *Nixon*, 418 U.S. 683 (1974)	9, 12

Cases—Continued: Page

United States v. *United States Mine Workers*, 330 U.S. 258 (1947) 12
Youngstown Sheet & Tube Co. v. *Sawyer*:
343 U.S. 597 (1952) 12
343 U.S. 937 (1952) 11

Constitution and rule:
U.S. Const. Amend. IV 8, 10
Sup. Ct. R. 18 9

Miscellaneous:
53 Fed. Reg. 11975 (1988) 6
Mandatory Guidance for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11979 (1988) 3
Lindgren & Marshall, Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals, 1986 Sup. Ct. Rev. 259 12

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-427

MARK B. HARMON, ET AL., PETITIONERS

v.

RICHARD L. THORNBURGH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. App. 1a-12a) is not yet reported.

JURISDICTION

The judgment of the district court granting petitioners' request for a preliminary injunction was entered on July 29, 1988 (Pet. App. 13a), and a judgment making that injunction permanent was entered on that same date (Pet. App. 15a). A notice of appeal was filed by respondents on August 5, 1988 (Pet. App. 19a), and the case was docketed in the court of appeals on August 11, 1988 (Pet. App. 21a).

The petition for a writ of certiorari before judgment was filed on September 8, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

A. The Department of Justice Drug-Testing Program

1. On September 25, 1987, after more than a year of study, the Department of Justice announced the Department of Justice Drug-Free Workplace Plan (Pet. App. 33a-66a). In order to eliminate illegal drug use from the Department's workplace, while at the same time assuring employees that "personal dignity and privacy [would] be respected" in so doing (*id.* at 36a), the Plan set forth a multifaceted program for (1) employee assistance in obtaining treatment and counseling for drug abuse problems; (2) supervisory training in detecting and dealing with drug problems; (3) employee education on the dangers of illegal drugs; and (4) identification of illegal drug use through the use of drug testing on a carefully monitored basis (*ibid.*).

Thereafter, on December 15, 1987, the Department issued its Drug-Free Workplace Plan for its Offices, Boards, and Litigating Divisions ("OBDs") (Pet. App. 67a-84a).[1] The OBD Plan authorizes urinalysis drug testing when there is "reasonable suspicion" of illegal drug use based upon documented, objective

---

[1] The Department components that are included in the OBD Plan are listed at Pet. App. 67a-68a. Several Department components have separate drug programs, and thus are not included in the OBD Plan. Those include the Immigration and Naturalization Service, the Drug Enforcement Administration, the Federal Bureau of Investigation, the United States Marshals Service, and the Bureau of Prisons.

facts (Pet. App. 74a-75a); when an employee is involved in an accident or unsafe practice (*id.* at 76a-77a); as part of a follow-up to successful completion of drug rehabilitation through the Department's Employee Assistance Program (*id.* at 77a); or as part of a limited random testing program (*id.* at 74a).

2. The random drug-testing program under the OBD Plan applies only to employees who hold certain specified sensitive positions. They include (1) employees authorized to have access to top secret classified information; (2) attorneys responsible for conducting grand jury proceedings and personnel who assist them; (3) high-level officials serving under Presidential appointments; (4) attorneys whose duties include the prosecution of criminal cases; and (5) attorneys and other employees whose duties include maintaining, storing, or safeguarding a controlled substance. Pet. App. 73a.[2] The procedures for sample collection and urinalysis incorporate (see *id.* at 57a, 74a) the requirements set forth in the Department of Health and Human Services (HHS) regulations governing all federal employee drug-testing programs. See *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, 53 Fed. Reg. 11979 (Apr. 11, 1988) [hereinafter HHS Reg.]

An employee who has been selected for random testing is met at the collection site and presents a

---

[2] Petitioners' description (Pet. 3-6) of the DOJ Plan is not entirely accurate, since it appears to be based on materials that have been superseded. For example, although petitioners indicate (Pet. 4) that the Plan covers all Assistants to the Solicitor General, the Plan in fact covers only the two Assistants in that office who have clearances at the Top Secret level or higher.

photo identification (Pet. App. 4a; HHS Reg. § 2.2(f)(2)). When the actual testing begins, the employee will be asked to remove his outer garments (such as coats and jackets) and to wash his hands (Pet. App. 4a; HHS Reg. § 2.2(f)(4)). The employee will then be directed to a closed rest room stall where the specimen is to be provided (Pet. App. 4a; HHS Reg. § 2.2(f)(7)). Direct observation by the collection monitor is permitted only where there is reason to believe that the particular individual may attempt to alter or substitute a sample (Pet. App. 4a; HHS Reg. § 2.2(f)(16)).

After the sample is taken, the collection monitor, in the presence of the employee, transfers the sample to a specimen bottle and measures its temperature to make sure the sample has not been altered or substituted (Pet. App. 4a-5a; HHS Reg. § 2.2(f)(12)). An identification label, bearing the employee's fingerprint, his identification number and the date, is then placed around the bottle, and a tamper-proof custody seal is taped over the top and down the sides. The employee signs a log book, which the collector also initials, and a chain-of-custody form is prepared to follow the specimen. The sample is then placed in a tightly sealed container and sent to the laboratory for analysis (Pet. App. 5a; HHS Reg. § 2.2(f)(19), (20), (24), (25), (g), and (h)).

The laboratory to which the samples are submitted must be managed by an individual who is either certified as a laboratory director in forensic or clinical laboratory toxicology, or who has a Ph.D. in one of the natural sciences, or who has training and experience comparable to a Ph.D. in one of the natural sciences (HHS Reg. § 2.3(a(1) and (2)). This individual must have experience in "analysis of bio-

logical materials for drugs of abuse" (*id.* § 2.3(a)(2)(iv)). The laboratories must maintain a security system (*id.* § 2.4(a)(1)) and follow detailed chain-of-custody procedures (*id.* § 2.4(a)(2)). The Secretary of HHS, as well as the Department of Justice itself, has the right to inspect the laboratory at any time (*id.* § 2.4(a)(1)), and the laboratory must maintain and make available, for at least two years, documents on all aspects of the testing process (*id.* § 2.4(m)). In addition, the regulations set forth elaborate quality assurance and control procedures (*id.* § 2.5), including thorough use of blind samples (*id.* § 2.5(d)).[3] They also prescribe standards for laboratory filing systems (*id.* § 2.3(f)), training (*id.* § 2.3(e)), refrigerated storage of specimens (*id.* § 2.4(c) and (h)), and reporting of results (*id.* § 2.4(g)).

Once the samples are submitted to the laboratory, they are analyzed for the presence of marijuana (cannabinoids), cocaine, opiates, amphetamines, and

---

[3] To be certified to perform drug-testing for federal agencies, a laboratory is subjected to a performance test, requiring it to test three cycles of blind samples over a period of at least three months (HHS Reg. §§ 3.17, 3.18). A single false positive result during this initial performance assessment "will automatically disqualify a laboratory from further consideration" (*id.* § 3.19(a)(1)). During the first 90 days following the certification of a laboratory, the agency must submit to the lab "blind performance test specimens * * * in the amount of at least 50 percent of the total number of samples submitted (up to a maximum of 500 samples) and thereafter a minimum of 10 percent of all samples (to a maximum of 250) submitted per quarter" (*id.* § 2.5(d)(2)). After certification, laboratories must continue to be "challenged" every other month with a set of at least ten specimens (*id.* § 3.17(c)).

phencyclidine (Pet. App. 74a). "In response to concern that specimens may be misused to test for physiological states other than drug abuse (e.g., pregnancy)" (53 Fed. Reg. 11975 (1988)), HHS Reg. § 2.1(c) expressly provides that urine specimens "shall be used only to test for those drugs included in agency drug-free workplace plans and may not be used to conduct any other analysis or test unless otherwise authorized by law." Two tests are conducted on the samples. There is an initial screening test that uses the Radio-Immuno-Assay technique (Pet. App. 5a; HHS Reg. § 2.4(e)(1)). Any specimen that is identified as positive on the initial test must then be confirmed using gas chromatography/mass spectrometry (GC/MS) (Pet. App. 5a; HHS Reg. § 2.4(f)(1)). No sample is considered to be positive unless it is positive on the GC/MS test (HHS Reg. § 2.4(g)(2)), "which is the most reliable indicator of the presence of drug metabolites in urine (Pet. App. 5a).

After the samples have been analyzed, the laboratory reports its results to a "Medical Review Officer," who must be "[a] licensed physician * * * who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history and any other relevant biomedical information" (HHS Reg. §§ 1.2, 2.4(g)). The Medical Review Officer must "review and interpret positive test results" before any such results may be transmitted to the Department (*id.* § 2.7(a) and (b)). The Medical Review Officer must examine "alternate medical explanations for any positive test result"; in doing so, he may interview the employee, review the employee's medical records, or consider other biomedical factors (*id.* § 2.7(b)). Before veri-

fying a positive test result, the Medical Review Officer must offer the employee an opportunity to discuss the result (*id.* § 2.7(c)). The Medical Review Officer may also order a reanalysis of the original sample "[s]hould any question arise as to the accuracy or validity of a positive test result" (*id.* § 2.7(e)). After verifying the positive result, the Medical Review Officer transmits it to the Department.

3. On June 27, 1988, employees in the OBDs were given notices explaining that the DOJ drug-testing program would go into effect in 60 days (see Pet. App. 2a, 90a-97a). The notice contained a booklet, explaining to employees the nature and purposes of the drug-testing program. Employees who are subject to random drug testing also will receive an individual notice prior to the initiation of random testing (*id.* at 44a-45a).

B. The Present Controversy

1. Petitioners, who are 42 Department employees, including 38 attorneys, three paralegals, and one economist, brought this action in the District Court, seeking, inter alia, to enjoin the Department from implementing the OBD drug-testing program. All but one of the petitioners hold positions that entitle them to conduct grand jury investigations, to prosecute criminal cases, or to receive top secret classified information.[4]

---

[4] One of the petitioners, David Orbach, an attorney in the Commercial Litigation Branch of the Civil Division, does not appear to fit into any of those categories, and we do not know of any reason at this time why he would be subject to random testing.

2. On July 29, 1988, the district court granted petitioners' motion for a preliminary injunction (Pet. App. 1a-12a), and on the same date, on respondents' application, entered an order making that injunction permanent (*id.* at 15a). The court recognized that "drug abuse by federal employees is intolerable" (*id.* at 5a), but it found that the Department's plan "to eradicate drugs from the federal workplace" (*ibid.*) was an unreasonable search within the meaning of the Fourth Amendment. It first found (*id.* at 6a) that the Plan was not "justified at its inception" because "it is highly unlikely that compulsory random urinalysis drug testing of otherwise trusted and apparently law-abiding employees would turn up evidence of work-related drug use." Moreover, the court explained, "[b]ecause 'strong privacy interests are involved,'" there must be a showing of compelling need to justify a testing program that does not require individualized suspicion (*id.* at 7a-8a). The court could find no such need in the present case, rejecting respondents' contentions that the Department's interests in the integrity, efficiency, and reputation of its employees were sufficient to justify the OBD drug plan. In particular, the court stated (*id.* at 8a), "there is no nexus between fitness for duty, security and integrity on the one hand, and compulsory random urinalysis drug testing on the other, where no drug problem is believed to exist." The court explained further that the Department's interest in its employees' fitness for duty was "severely weakened by the fact that urinalysis does not measure an employee's current impairment" (*id.* at 9a). And because the court perceived no evidence of an existing drug problem within the Department, it also rejected as insubstan-

tial (*id.* at 10a) respondents' interests in deterring illegal drug use by employees, maintaining the security of classified information, and ensuring the public reputation of the Department.

ARGUMENT

Certiorari before judgment is an "extremely rare occurrence" (*Coleman* v. *PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J.)). This "extraordinary" power (*Ohio* v. *Price*, 360 U.S. 246, 247 n.1 (1959) (Brennan, J.)) is reserved exclusively for those issues of "public importance" that require "prompt resolution" by this Court (*United States* v. *Nixon*, 418 U.S. 683, 687 (1974)). Supreme Court Rule 18 summarizes those stringent requirements, providing that certiorari before judgment is available only "upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." For several reasons, the present case does not satisfy that exacting standard.

First and foremost, the case does not require "immediate settlement in this Court" (Rule 18). Petitioners were the prevailing parties in the district court, having secured a permanent injunction against the commencement of the Department's random drug-testing program. Respondents have not sought a stay of that judgment from the court of appeals. Thus, under the status quo, petitioners have achieved a full measure of litigation success, and run no risk of being subjected to random drug-testing during the pendency of the litigation in the court of appeals. Moreover, as prevailing parties, petitioners are not normally entitled to petition this Court for a writ

of certiorari. See *California* v. *Rooney*, No. 85-1835 (June 23, 1987) (per curiam). There is no reason to depart from that rule in this case.

Second and relatedly, the present case does not demand "immediate" review by this Court because it is already scheduled for expedited consideration by the court of appeals. Pursuant to the court of appeals' scheduling order, briefing of the case must be completed by November 28, 1988, and oral argument will be held on December 15, 1988. Thus, even were this Court to accept petitioners' suggestion (Pet. 18) for expedited briefing, the case would not likely be considered by this Court earlier than the date already set for argument in the court of appeals. Petitioners offer no reason to pretermit the court of appeals' review.

Third, while there may some day be a "need for a ruling from this Court" (Pet. 13) on the general issue of random drug-testing, there is surely no need for such a ruling in this case at this time. To the contrary, the Court is presently scheduled to hear argument on November 2, 1988, in two cases raising broad questions about drug and alcohol testing under the Fourth Amendment: *National Treasury Employees Union* v. *von Raab*, No. 86-1879; and *Burnley* v. *Railway Labor Executives' Ass'n*, No. 87-1555. While, in some respects, those cases involve different testing programs, the issues involved are, as petitioners acknowledge (Pet. 18), "closely related" to those raised in present case, and there is every reason to believe, as the district court concluded (Pet. App. 11a), that the Court's disposition of those cases "will likely control the ultimate disposition of this case." Petitioners do not explain why the court of appeals cannot be trusted to apply this Court's deci-

sions faithfully, possibly obviating the need for further review by this Court.

Fourth, even were there a reason to decide questions about random drug-testing at this time, this case is not the most appropriate vehicle for doing so. There are at present several random drug-testing cases now before the courts of appeals, each of which poses essentially the same issues as this case. See, *e.g.*, *AFGE* v. *Dole*, 670 F. Supp. 445 (D.D.C. 1987), appeal docketed, No. 87-5117 (D.C. Cir. Dec. 11, 1987) (air traffic controllers and other Department of Transportation employees) (appeal pending; oral argument scheduled for October 18, 1988); *National Fed'n of Fed. Employees* v. *Carlucci*, 680 F. Supp. 416 (D.D.C. 1988), appeal docketed, No. 88-5080 (D.C. Cir. Mar. 16, 1988) (Army aviation employees, guards and police, and other officials in sensitive positions) (appeal pending; oral argument scheduled for October 18, 1988); *AFGE* v. *Thornburgh*, No. 88-2841 (9th Cir.) (Bureau of Prisons employees) (appeal pending). Petitioners themselves recognize (Pet. 18) that it would be helpful to have the views of the courts in these and other cases should the Court take up the issue of random drug-testing. But unlike the present case, further review in any of these other cases would offer the Court "the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 937, 938 (1952) (Burton, J., dissenting from grant of certiorari before judgment).

Finally, although the questions posed by random drug-testing may well be of "public importance" (Pet. 13), they are not, in the present context, of the same commanding significance as the issues that this

Court has traditionally reviewed by a grant of certiorari before judgment. Thus, this case presents none of the recurring circumstances in which the Court has seen fit to exercise this extraordinary power: cases involving challenges to the constitutionality of a federal statute,[5] pressing questions of foreign policy,[6] or the need for immediate action to protect the Court's own institutional authority.[7] See generally Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259, 288-297.

Apart from all else, we believe that the petition in this case betrays a disturbing perspective on the work of this Court, of the courts of appeals, and of the judiciary in general. At bottom, petitioners' proposal amounts to the assertion that because this Court will almost certainly reach the issue of random drug-testing eventually, and because it has the ultimate authority to decide that issue, it might as well get it over with and vote now. But that overlooks the fact that litigation—especially litigation involving is-

---

[5] See *United States* v. *Mistretta*, No. 87-1904 (June 30, 1988); *Carter* v. *Carter Coal*, 298 U.S. 238 (1936); *Railroad Retirement Board* v. *Alton R.R.*, 295 U.S. 330 (1935).

[6] See *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); *Wilson* v. *Girard*, 354 U.S. 524 (1957); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Cincinnati Soap* v. *United States*, 301 U.S. 308 (1937); *Ex parte Quirin*, 317 U.S. 1 (1942); *United States* v. *United States Mine Workers*, 330 U.S. 258 (1947); *The Three Friends*, 166 U.S. 1 (1897).

[7] *See United States* v. *Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *United States* v. *United States Mine Workers*, 330 U.S. 258 (1947).

sues of significant public importance—is a deliberative process. The two drug-testing cases now before the Court, *Burnley* and *von Raab*, will very likely influence the disposition of this case by the court of appeals. And the way in which the courts of appeals respond to whatever this Court decides in *Burnley* and *von Raab* may influence any decision that this Court ultimately renders on the issue of random drug-testing. But that is hardly a failure of process; rather, it is precisely how one hopes wisdom is achieved. Petitioners' argument in the end amounts to a demonstration why in all but the most unusual cases—a category that Congress only last year drastically reduced by eliminating most types of direct appeals to this Court—the regular judicial process should be allowed to run its course.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

LEONARD SCHAITMAN
LOWELL V. STURGILL, JR.
Attorneys

OCTOBER 1988

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 241699 60692